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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1088

LIFE OF THE LAND, et al.,
Petitioners,

vs.

CLAUDE S. BRINEGAR, Secretary of Transportation, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI
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The petitioners, Life of the Land, Hawaii Audubon Society, Friends of the Earth, Raymond Catania, J. Abraham Pasadaba, Wilfred H. Paul, Jr., and Pete Kaululaau G. Thompson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for

the Ninth Circuit entered in this proceeding on September 10, 1973, rehearing denied, October 16, 1973.[1]

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, (hereinafter "Opinion"), not yet officially reported, appears at 5 E.R.C. 1780, 3 E.L.R. 20811,[2] and as Appendix A. That court's Order denying the Petition for Rehearing appears as Appendix B. The Decision and Order of the United States District Court for the District of Hawaii, dated December 22, 1972, is reported at 363 F.Supp. 1171 (D.Haw. 1972) and appears as Appendix C. The Final Decision and Order of that court, dated April 13, 1973, incorporating by reference the reasoning set forth in the December 22, 1972 Decision and Order, appears as Appendix D.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on September 10, 1973. A timely petition for rehearing *en banc* was denied by

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[1]Respondents are Claude S. Brinegar, Secretary of the United States Department of Transportation; John Shaffer, Administrator, Federal Aviation Administration (FAA), National Office; Jack Webb, Administrator, FAA, Pacific Region; E. Alvey Wright, Director, Hawaii Department of Transportation; Kalihi Palama Community Council; James Y. Muraoka; Takeshi Uyesugi; and Dillingham Corporation.

[2]"E.R.C." citations refer to Environment Reporter Cases, published by the Bureau of National Affairs; "E.L.R." citations refer to Environmental Law Reporter, published by the Environmental Law Institute.

that court on October 16, 1973. This petition for certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is the standard of judicial review under the National Environmental Policy Act (NEPA) of a threshold agency decision to omit from an environmental impact statement any mention of certain environmental impacts of and alternatives to the proposed project, whether that decision was arbitrary and capricious, with the burden of proof upon plaintiffs, or whether that decision was reasonable, with the burden of proof upon the agency?

2. Is an environmental impact statement for an airport expansion project that fails to mention reasonable non-construction alternatives to the project adequate under the National Environmental Policy Act (NEPA) and under the Airport and Airways Development Act of 1970 (AADA)?

3. Does NEPA permit the preparation of an environmental impact statement to be delegated to a private party with a major and direct financial interest in the proposed project which is the subject of that impact statement?

STATUTORY PROVISIONS INVOLVED

A. *National Environmental Policy Act of 1969 (NEPA)* United States Code, Title 42:

§4321. *Purpose.*
(Text set forth in Appendix E)

§4331. *Congressional declaration of policy.*
(Text set forth in Appendix E)

§4332. *Administration consistent with policies of Act.*
(Text set forth in Appendix E)

B. *Airport and Airways Development Act of 1970 (AADA)* United States Code, Title 49:

§1716. *Submission and approval of projects for airport development.*
(Text set forth in Appendix E)

STATEMENT OF THE CASE

This is an environmental law case involving the adequacy of the Environmental Impact Statement (hereinafter "EIS") for the Reef Runway project at Honolulu International Airport, Honolulu, Hawaii, and the appropriate standard of judicial review thereof, under the provisions both of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321 et seq., and the Airport and Airways Development Act of 1970 (AADA), 49 U.S.C. §§1701 et seq. The case presents issues of nation-wide importance concerning which the circuits are in conflict, and upon which this Court has never ruled.

Petitioners, the Plaintiffs and Appellants below, are three environmental organizations and four individual residents of Kalihi-Palama, the area most affected by flight patterns of aircraft arriving and departing from Honolulu International Airport (hereinafter "HIA"). Respondents are those agencies and employees of the Federal and State governments responsible for construction of the Reef Runway. Additional Respondents, allowed by the District Court to intervene over the objection of Petitioners, see Decision and Order of the District Court, 363 F.Supp. 1176, footnote 19, Appendix C, p. 42, are the private company awarded the construction contract for the project, and other Kalihi-Palama residents who favor the runway.

Petitioners filed suit challenging the EIS for the Reef Runway project in the United States District Court for the District of Hawaii on November 8, 1972. Jurisdiction of that court was based upon 5 U.S.C. §701-6 (Administrative Procedure Act); 28 U.S.C. §1331 (Federal Question); 28 U.S.C. §1337 (Regulation of Interstate Commerce); and 28 U.S.C. §1361 (Mandamus). Record p. 3.

The Complaint alleged, *inter alia,* that Respondents had not complied with the requirements of Section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C), because the Reef Runway EIS failed to discuss or even mention certain reasonable alternatives to the proposed runway, Rec. 11-13; that Respondents had not satisfied the requirements of Section 16(c)(4) of AADA, 49 U.S.C. §1716(c)(4), because they had not

established that no feasible and prudent alternative to the Reef Runway existed, Rec. 14-15; and that Respondents had violated NEPA's requirement that the "responsible [federal] official" prepare the EIS by delegating preparation thereof to a private consultant with a financial interest in construction of the proposed Reef Runway. Rec. 13-14.

The Reef Runway would be a new 12,000 foot jet runway at HIA, 6,700 feet seaward of and parallel to the existing primary runway, that would nearly double the capacity of HIA. The runway would cost more than $70,000,000.00 and is scheduled to be completed by 1975. It would be built off-shore and would consume some 1,240 acres of ocean coral reef, 765 acres of which would be paved over. EIS, (D-1 in evidence below) pp. 11, 12, 38.

Approximately 186 acres of silted coral mudflats used for roosting and nesting by birds, including the Hawaiian Stilt, an endangered species of bird unique to the Hawaiian Islands, would be destroyed. EIS, p. 26.

The Reef Runway would affect water quality in the surrounding ocean, although whether that effect would be beneficial or adverse is in dispute. See: EIS, pp. 18, 31-2; D-6 ("Plan to Enhance Water Quality in Keehi Lagoon") (beneficial impact); D-16, Appendix 3 ("Study Report—Proposed Reef Runway—Honolulu International Airport"), p. 5; D-18 ("Hydraulic Model Study, Proposed Reef Runway, Honolulu International Airport"), §4, p. 43; Tr. 241-6; 319, 320; P-28 through P-33, and P-39 (adverse impact).

Similarly, the Runway would have an impact both upon air quality and population levels within the state, although again the nature of those impacts is disputed.[3] See Tr. 574-6; 686; 766-7 (air quality: negligible or even beneficial impact); Tr. 134-5; 152, 161-3; 188; 199-200 (air quality: adverse impact); Tr. 767-8; 783-4; 804-5; 807 (demographic impact: negligible); Tr. 24, 27, 29-34, 38-40, 46, 56, 57-8, 65-6, 67, 69, 75 (demographic impact: adverse).

The Reef Runway EIS, dated January, 1972, is the document prepared by Respondents to satisfy the provisions of AADA, and particularly 49 U.S.C. §1716(c)(4), as well as those of NEPA: Tr. 758; 789-90; Opinion, App. A, p. 29. It consists of a total of 46 pages, plus appendages, including a one-and-three-quarter page discussion of four alternatives to the proposed Reef Runway: (1) a new on-shore runway oriented in a 100°-280° direction; (2) a new on-shore runway parallel to existing runway 08-26; (3) a 4,000 foot westward extension of existing runway 08-26 plus an additional new on-shore 6,500 foot reliever runway parallel thereto; and (4) foregoing construction of the Reef Runway altogether. EIS, pp. 34-5.

The purposes of the Reef Runway, as set forth in the EIS, are (1) to increase the capacity of HIA; (2) to reduce the level of aircraft noise over adja-

[3]The EIS does not discuss or even mention the impact of the project upon either air quality in terms of invisible air pollution, or upon population levels and the adverse "secondary" effects that flow from increased population. See Opinion, App. A, pp. 18-21.

cent populated areas by moving present overflights seaward from those areas; (3) to lessen the danger of an aircraft crash into populated areas by the same means; and (4) to increase flexibility at HIA to allow for runway repairs and shut-downs. EIS, pp. 4-5; Opinion, App. A, p. 12.

The chief issue in this litigation has been whether Respondents have complied with the requirements of NEPA and AADA that they discuss in the EIS and consider in their decision-making reasonable alternatives to the Reef Runway which might accomplish these objectives with less environmental harm and at a smaller economic cost.

Petitioners demonstrated at trial that a variety of such reasonable "non-construction" alternatives exist that were not discussed or even mentioned in the EIS. One such alternative, for example, would be to require the two commercial inter-island carriers, Hawaiian Airlines and Aloha Airlines, to commence the takeoff runs of their twin jet DC-9's and Boeing 737's, respectively, from the far western end of the existing primary jet runway, rather than from the present takeoff point, approximately 4,000 feet to the east and closer to the populated areas. At least as to those aircraft, which are as noisy as a Boeing 747, this procedure would immediately eliminate noise and over-flight problems in the Kalihi-Palama Community. Tr. pp. 206-19; 230-1; D-20 (Stanford Research Institute, *Runway Development Requirement at Honolulu International Airport* (1969), at pp. 2, 12, 32).

Other reasonable alternatives not mentioned in the EIS include removing military and general aviation from HIA (thereby reducing the number of operations at HIA by a total of 56%, see Opinion, App. p. 5, and increasing the capacity of HIA by the same percentage), improving air traffic control, employing aircraft with less noisy engines, retrofitting older aircraft with quieter engines, adjusting and consolidating airline schedules so as to increase the passenger load factor on individual flights, and converting the aircraft fleet to wide-body aircraft. See "The Jamaica Bay-Kennedy Airport, A Multi-Disciplinary Environment Study", in evidence as P-4(a) and P-4(b); Tr. 407-13, 423-4, 427-31 (testimony of Prof. Joseph Sax); 815-16 (National Transportation Report).

The Ninth Circuit ruled that the failure of the Reef Runway EIS to mention these alternatives (as well as its failure to include other information such as the impact of the project upon population levels and air quality) did not render it and the decision-making process inadequate under NEPA. The court held that such omissions in an EIS violate that statute only if Petitioners are able to demonstrate that the threshold agency decisions to omit were arbitrary and capricious or an abuse of discretion. Opinion, App. A. pp. 22-4 (non-construction alternatives); pp. 18-9 (demographic impact); pp. 20-1 (air quality impact).

With respect to AADA, the Ninth Circuit held that the EIS should be taken into account in deter-

mining whether the Secretary of Transportation had satisfied the AADA requirement that he determine that no feasible and prudent alternative to the Reef Runway exist before approving the project. Opinion, App. A, p. 29. Relying on its NEPA rulings, the court held that the Secretary had complied with AADA. *Ibid.*

A private engineering firm, the Ralph M. Parsons Company (hereinafter "Parsons"), which, as found by the Ninth Circuit, "had a financial interest in an affirmative decision on the proposed project", Opinion, App. A, p. 13, participated substantially in the preparation of the EIS.

The full extent of Parsons' participation, and of its apparent financial conflict of interest therein, is, however, unclear in the record because the district court judge ruled several times at pretrial and during the course of the trial *as a matter of law* that the preparation of an EIS may be delegated to a private party with a major financial interest in the proposed project. See e.g., Tr. pages 357-8; 363. Consequently, Petitioners were precluded by the trial court from developing the relative degrees of participation by Parsons, the state agency, and the federal agency, although Petitioners' counsel made ample offers of proof on this issue. Tr. 363; 365-6; 368; 369-70; 372; 375-81.

Notwithstanding this, the Ninth Circuit rejected Petitioners' improper delegation claim on the ground that the FAA had participated significantly in the preparation of the EIS. Opinion, App. A, pp. 14, 15.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS WITH RESPECT TO THE PROPER STANDARD OF JUDICIAL REVIEW OF THE THRESHOLD FEDERAL AGENCY DECISION TO OMIT DISCUSSION OR EVEN MENTION IN AN ENVIRONMENTAL IMPACT STATEMENT UNDER NEPA OF CERTAIN ENVIRONMENTAL CONSEQUENCES OF AND ALTERNATIVES TO A PROPOSED PROJECT.

This case involves more than the technical sufficiency of the EIS for the Reef Runway,[4] and indeed more than the fate of the Reef Runway itself. Rather, the opinion below constitutes an emasculating interpretation of NEPA, "the broadest and perhaps most important" of recent federal environmental legislation, *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1111 (D.C.Cir. 1971).

NEPA was intended by Congress to achieve ambitious but vitally important goals. Section 101(a) of NEPA, 42 U.S.C. §4331(a), declares it to be the "continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and to maintain conditions under which man and nature can exist in productive harmony. . . ." NEPA directs, moreover, that "to the fullest extent possible . . . the

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[4]Petitioners do not seek merely a superficial rewriting of the EIS. Petitioners contend, rather, that if the various non-construction alternatives to the project are genuinely considered by the decision makers, the ultimate decision that the Reef Runway is necessary at all may well be reversed. Cf. *Citizens to Preserve Overton Park v. Volpe*, ... F.Supp. ....., ..., 3 E.L.R. 20423, 20423 (W.D.Tenn. 1973) (Secretary of Transportation, upon being compelled to consider alternatives to proposed routing of interstate highway through park following Supreme Court decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), reverses prior decision to approve federal funding for such route.)

policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act." 42 U.S.C. §4332(1).

The primary device created by Congress to effectuate this policy is the requirement contained in Section 102(2)(C) of NEPA that prior to undertaking "major Federal actions significantly affecting the quality of the human environment" the "responsible [federal] official" must prepare a "detailed statement" (the so-called "EIS") including discussion of, *inter alia,* "the environmental impact of the proposed action"; "any adverse environmental effects which cannot be avoided should the proposal be implemented"; and "alternatives to the proposed action". 42 U.S.C. §4332(2)(C).

The importance Congress placed upon the section 102(2)(C) requirements as a means of achieving NEPA's goals is emphasized by NEPA's legislative history. In hearings concerning NEPA held at a time when the bills under consideration did not include these requirements, Senator Jackson, NEPA's principal sponsor, responded as follows to a witness who suggested the need therefor:

> I have been concerned with the adequacy of the policy declarations in the bill that I introduced. Obviously, this is not enough. . . .
>
> . . . I agree with you that realistically what is needed in restructuring the governmental side of this problem is to legislatively create those situations that will bring about an action-forcing procedure with which departments must comply.

> Otherwise, these lofty declarations are nothing more than that. It is merely a finding and statement but there is no requirement as to implementation. *Hearings on S.1075, S.237, and S.1752 before the Senate Committee on Interior and Insular Affairs*, 91st Congress, 1st Session 116 (1969).

NEPA was thereupon amended by the Committee to establish the Section 102(2)(C) EIS procedures, which were again characterized as "action-forcing" both in the Committee Report, S. Rep. No. 91-296, 91st Cong., 1st Sess. 9 (1969), and by Senator Jackson on the floor of the Senate during debate on the passage of the bill. 115 Cong. Rec. 40416 (1969).[5]

Once prepared by the responsible federal agency, the EIS is to be circulated to "appropriate federal, state and local agencies" for their review and comment. The EIS, together with any such comments, is then to "be made available to the President, the Council on Environmental Quality and to the public" prior to any final determination on the project. 42 U.S.C. §4332(2)(C).

From this statutory scheme, it is manifest that NEPA is to "serve as an environmental full disclosure law, providing information which Congress thought *the public* should have concerning the particular environmental costs involved in a project," *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973)

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[5]For a detailed summary of the legislative history of NEPA, see Anderson, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act* (Environmental Law Institute, 1973), Chapter 1 ("NEPA and Congress"), pp. 1-14.

(emphasis supplied), whose purpose is to compel consideration of environmental factors in the decision-making process, not only by the particular agency involved, but also by the ultimate decision makers: The President, the Congress, and the public. See: *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971); *Natural Resources Defense Counsel v. Morton*, 458 F.2d 827, 835 (D.C. Cir. 1971); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973).

This function was spelled out in a report prepared for the Senate Committee on Interior and Insular Affairs:

> To make policy effective through action, a comprehensive system is required for the assembly and reporting of relevant knowledge; and for placing before the President, the Congress, and the people, for public decision, the alternative courses of action that this knowledge suggests. L. Caldwell, A Special Report to the Senate Comm. on Interior and Insular Affairs, A National Policy for the Environment 11, 90th Cong., 2nd Sess. (Comm. print July 11, 1968). Also at 115 *Cong. Rec.* S. 12129 (daily ed. Oct. 8, 1969).

Because of this fundamental purpose of NEPA and the EIS, the courts should review with especially close scrutiny threshold agency decisions not to prepare an EIS at all or to omit discussion in an EIS of certain environmental impacts of, or alternates to, a proposed project.

The Ninth Circuit, however, has now held that it will apply the Administrative Procedure Act's very

limited "arbitrary and capricious" standard of review, 5 U.S.C. §706(2)(A), to these threshold agency decisions. Moreover, the Ninth Circuit places the burden *upon Petitioners* to demonstrate that such decisions were arbitrary, capricious, or an abuse of discretion. Opinion, App. A, pp. 17-24. For example, the court held that Petitioners had failed to prove that the various non-construction alternatives not mentioned in the EIS, even though "utilized at other airports in the continental United States, are necessarily adaptable to the unique situation existing at HIA." Opinion, App. A, p. 24, fn. 13.

By adopting this very limited standard of review the Ninth Circuit has put itself at odds with at least four other Courts of Appeals that have passed on the standard of review under NEPA of these threshold agency decisions. There are now three different standards of review in the various circuits: (1) That of the Ninth Circuit in this case; (2) That of the Second Circuit in *Hanley v. Kleindienst,* 471 F.2d 823, 829, 836 (2d Cir. 1972), cert. denied, ... U.S. ....., 93 S.Ct. 2290 (1973), and of the Seventh Circuit in *First National Bank v. Richardson,* ..... F.2d ....., 5 E.R.C. 1830, 3 E.L.R. 20771, 20776 (7th Cir. Sept. 13, 1973) (arbitrary and capricious standard is appropriate, but *the agency* has the affirmative duty to develop a reviewable environmental record and to demonstrate that its decision was *not* arbitrary and capricious); and (3) that of the Fifth Circuit in *Save Our Ten Acres v. Kreger,* 472 F.2d 463, 465-7, (5th Cir. 1973), and the Tenth Circuit in *Wyoming Council v. Butz,* ..... F.2d ....., 5 E.R.C. 1844, 1846, 3 E.L.R. 20830, 20831

(10th Cir. Sept. 21, 1973) (arbitrary and capricious standard rejected; appropriate standard is whether the agency's decision was reasonable, with the burden of demonstrating reasonableness upon the agency).[6]

This split among the circuits creates an intolerable situation. Federal agencies with responsibilities affecting the environment now must devise NEPA procedures and evaluate the adequacy of impact statements in terms of three different judicial standards. The matter is complicated by the fact that many agency actions affect the environment in more than one judicial circuit. With impact statements currently being prepared by federal agencies at a rate of more than 1,000 per year, see *Environmental Quality, the Fourth Annual Report of the Council on Environmental Quality* (1973), at 242, establishment of a uniform standard for judicial review is an urgent necessity.

Perhaps the standard set forth in the APA, 5 U.S.C. §706(2)(A), is the correct standard for review of the ultimate substantive agency decision to proceed or not to proceed with the project. See, e.g., *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 297-300 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1973); *Sierra Club v. Froehlke*, ... F.2d ....., ..., 5 E.R.C. 1920, 1925 (7th Cir. Oct. 2, 1973). But the

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[6]These cases involve agency decisions whether to prepare an impact statement at all rather than what to include in an impact statement. Clearly, however, both decisions have the same relation to the statutory goals and must be judged by the same standard. Otherwise, an agency could too easily defeat the purposes of NEPA by preparing an EIS that was little more than a hollow shell, omitting crucial information on the impacts of and alternatives to the proposed project.

Ninth Circuit has confused the issue of review of the ultimate substantive decision of the agency with the question of *procedural* compliance by the agency with NEPA, and more particularly of the *adequacy* of the EIS in terms of what information should be included therein. Clearly two different standards of review should apply to these distinct issues. See *Save Our Ten Acres v. Kreger, supra,* at 472 F.2d 467; *Sierra Club v. Froehlke, supra,* at ..... F.2d ....., 5 E.R.C. 1924.

The narrow arbitrary and capricious standard of review under the Administrative Procedure Act is an inappropriate standard of review of procedural compliance since "NEPA's specific requirements in [§4332 (2)(C)] clearly speak in mandatory terms, and do not leave the determination to administrative discretion. [citations omitted]". *Wyoming Council v. Butz,* ..... F.2d ....., 5 E.R.C. 1844, 1846, 3 E.L.R. 20830, 20831 (10th Cir. Sept. 21, 1973). While "some area of judgment is [of course] involved . . . the compass of the judgment to be made is narrow . . .", and the test on review should be that "the determination *must be reasonable* in the light of the mandatory requirements and high standards set by the statute. [Citations omitted.]" *Id.* at ..... F.2d ....., 5 E.L.R. 1847, 3 E.L.R. 20831. *Accord: Save Our Ten Acres v. Kreger,* 472 F.2d 463, 465-7 (5th Cir. 1973).

Moreover, the spirit of the Act demands that the burden of proving compliance therewith fall upon the agency, and not upon citizen plaintiffs, since

> the very nature of this legal area is so extensive that if the burden were placed wholly upon citi-

> zen plaintiffs, the full disclosure requirements of NEPA would never be implemented satisfactorily, and environmental protection as contemplated by Congress would be little more than a fiction.

Sierra Club v. Froehlke, 359 F.Supp. 1289, 1335 (S.D. Tex. 1973). See also *Calvert Cliffs', supra*, at 449 F.2d 1118-9.

The practical effect of the Ninth Circuit's ruling, if left unchallenged is, to render NEPA superfluous and an act of futility by the Congress, because *even before NEPA* an agency's decision to adopt one alternative rather than another was subject to review under the APA standard.

Specifically, the decision below nullifies the two basic purposes of NEPA. First, it permits an agency too easily to exclude from its impact statement and its decision-making process alternatives not compatible with its own narrow conception of its mission, a conception which may be inconsistent with environmental protection. A major purpose of NEPA was to compel agencies to take a broader view.[7]

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[7]That this result actually will occur is apparent from this case, where the Ninth Circuit approved an impact statement for a $70,000,000.00 airport construction project which devotes only one-and-three-fourths pages to alternatives and which mentions no alternatives involving safer and more efficient airport management as opposed to additional construction. By employing its unique standard, the Ninth Circuit was able to justify omission of the alternative of removing Air Force jets by simply noting that "the Air Force had refused to move . . . .". Opinion, App. A. pp. 22-3. But one purpose of the EIS should have been to examine the costs and benefits of the Air Force decision. The

Second, it allows the agency too easily to frustrate the goal of NEPA to bring the public into the decision-making process with regard to environmental matters, and to open the opportunity for the public, with full data available to it in the form of an adequate EIS, to effect changes in substantive decisions made by public agencies, *even though those decisions might not be so wrong as to be characterizable as arbitrary, capricious, or an abuse of discretion.*[8]

Ninth Circuit justified non-discussion of the alternative of higher landing fees on the bootstrap ground that this alternative was considered but rejected by Respondents. *Id.* at 23. The court held that Respondents need not mention the alternatives of moving private aircraft and requiring inter-island jets to take off at different points because each of these measures was only a partial solution. *Ibid.* And, finally, the Ninth Circuit ratified Respondents' failure to mention the alternatives of consolidating airline schedules and converting to wide-body aircraft by stating that nothing in the record indicated these to be reasonable alternatives, *Id.* at 24, and at the same time brushing off the positive experience with these techniques at other airports as being irrelevant. *Id.* at 24, n. 13. If NEPA's requirement that an agency "discuss in detail" the alternatives to a proposed action means no more than this, it might as well not exist.

[8]In the Reef Runway situation, for example, had the public been appraised in the EIS of the full adverse effects upon the State of increased population and air pollution, or of certain alternatives to the project which did not happen to appeal to the agency, or were not within the agency's jurisdiction (such as compelling the military to remove its operations from HIA), the public might very well, through persuasion or intervention via Congress, have overruled the agency decision to proceed, *even though* that decision was not necessarily invalid under the APA test.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE DISTRICT OF COLUMBIA CIRCUIT IN NRDC v. MORTON, 458 F.2d 827 (D.C.CIR. 1972) AND WITH THIS COURT IN CITIZENS TO PRESERVE OVERTON PARK v. VOLPE, 401 U.S. 402 (1971), WITH RESPECT TO THE NEED TO DISCUSS AND CONSIDER ALTERNATIVES TO A PROPOSED AIRPORT EXPANSION PROJECT UNDER NEPA AND AADA, RESPECTIVELY.

A. NEPA.

As previously noted, NEPA requires that the EIS for a major federal action include discussion of the ". . . alternatives to the proposed action". 42 U.S.C. §4332(2)(C)(iii). Further, §4332(2)(D) mandates the federal agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources".

The Ninth Circuit held that Petitioners had not proved that Respondents' failure to mention in the EIS a whole range of non-construction alternatives to the Reef Runway was not arbitrary and capricious or an abuse of discretion. The propriety of this standard of review is discussed in Section I, *supra*. Among the reasons given for this general conclusion are (1) that removing military and general aviation operations from HIA altogether, and compelling the inter-island carriers to commence their take-offs from the far western end of the existing runway, would not, *by and of themselves individually*, totally solve the noise and safety problems at HIA, Opinion, App. A, pp. 22-3, and (2) that certain alternatives, such as, specifically, removing the Air Force KC-135 tanker operations

from HIA to a nearby military airport, were not within the immediate jurisdiction of the state agency: "There is, however, evidence indicating that the Air Force had refused to move its jet tankers to another base, *effectively eliminating implementation of this alternative*" (emphasis supplied), *Ibid.*

The Ninth Circuit's ruling on alternatives under NEPA places it squarely in conflict with the other leading NEPA case on the necessity to discuss alternatives in an EIS, *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 833-6 (D.C.Cir. 1972). *Morton* held both that an agency may not "disregard alternatives merely because they do not offer a complete solution to the problem", *Id.* at 458 F.2d 836, and that an agency may not omit discussion of an alternative in an EIS merely because implementation of that alternative is not within the jurisdiction of the particular agency. *Id.* at 458 F.2d 834.

The policy reasons for this rule are the same as those already noted in Section I, *supra*, to wit, that the EIS is designed not only to force the particular agency involved to consider environmental factors in its decision-making process, but, at least equally important, is *also* "for the guidance of these ultimate decision-makers [Congress, the President, and the public]" *Id.* at 458 F.2d 835.

B. AADA.

The Airport and Airways Development Act of 1970, 49 U.S.C. §§1701 *et seq.*, which authorizes the expenditure of substantial federal funds "in order to bring about, in conformity with the national airport system

plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics", 49 U.S.C. §1714(a), also expresses the Congressional intent that such airports be compatible with the surrounding natural environment and not contribute to its degradation. See generally 49 U.S.C. §1716(c)(4), -(d), and -(e).

To this end, Section 16(c)(4) of AADA, 49 U.S.C. §1716(c)(4), imposes even more stringent requirements than does NEPA upon the federal agency to consider alternatives before approving major airport expansion projects:

> . . . The Secretary [of Transportation] . . . shall authorize no such project found to have adverse [environmental] effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, *that no feasible and prudent alternative exists* and that all possible steps have been taken to minimize such adverse effect. (Emphasis supplied.)

The "no feasible and prudent alternative" language of AADA is identical to that of Section 4(f) of the earlier enacted Department of Transportation Act of 1966 concerning approval of highways through parks, 49 U.S.C. §1653(f), [23 U.S.C. §138]. Indeed, the House Report on AADA states: "The responsibility thus vested in the Secretary of Transportation is comparable to that contained in Section 4(f) of . . . the Department of Transportation Act." House Report 90-601, U.S. Code Cong. Adm. News, pp. 3057-8.

This Court interpreted §4(f) in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971). In *Overton Park,* Mr. Justice Marshall, speaking for a unanimous Court (Mr. Justice Douglas took no part in the consideration or decision of the case; Mr. Justices Brennan and Blackmun filed short concurring opinions), stated that

> This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—*only the most unusual situations are exempted.*
>
> . . . .
>
> . . . For this exemption to apply the Secretary *must find that as a matter of sound engineering it would not be feasible to build the highway along any other route. Id.* at 401 U.S. 411. (Emphasis supplied).

Further, this Court stated that

> . . . The very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly *unusual factors present* in a particular case or the cost or community disruption resulting from alternate routes reached *extraordinary magnitudes.* If the statutes are to have any meaning, the Secretary *cannot approve the destruction of parkland unless he finds that alternate routes present unique problems. Id.* at 401 U.S. 412-13. (Emphasis supplied.)

The Court reversed, indicating that it was not clear from the record whether the Secretary had made the requisite findings, and if so, the reasons "why he

believed there were no alternative routes . . ." *Id.* at 401 U.S. 408.

Although not concerned necessarily with parklands in section 16(c)(4) of AADA, Congress must have been equally concerned with the increased noise and air pollution, demographic impact, and safety problems that new airports and airport expansions inevitably bring.[9] Thus, the Secretary "cannot approve" these inevitable adverse environmental impacts unless he finds "as a matter of sound engineering" that alternatives to the proposed airport expansion "would not be feasible", or that they present costs or "community disruption" of "extraordinary magnitude", or otherwise present "unique problems".

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[9]Respondents will argue at this point that the Reef Runway is unique in that its effect would be to *improve* air quality, noise levels, and safety in the populated areas adjacent to HIA by moving aircraft operations 6,700 feet seaward, away from those areas. This argument is necessarily based upon the premise that use of the existing runway will be discontinued upon completion of the Reef Runway. This premise, however, is erroneous. The State Respondents have conceded, for example, that the existing runway will continue to be used by jet aircraft even after the Reef Runway is completed. P-107; Tr. 640. Moreover, the United States Air Force, whose KC-135 tankers are conceded by all parties to be the worst noise and safety offenders at HIA, has consistently refused to commit itself to utilizing the new Reef Runway. Indeed, if the Respondents are unwilling to compel inter-island jets to taxi an additional 4,000 feet to the western end of the existing runway before taking off because of the extra cost this entails, Tr. 215, it is difficult to see why either the Air Force or the commercial overseas carriers would or should take it upon themselves to incur the extra cost and fuel consumption in taxiing nearly *7,000* additional feet out to the Reef Runway. And, in any event, if, as the State and Federal Respondents maintain, the number of operations at HIA will have doubled by the year 1985 (from 250,000 operations in 1971 to an estimated 493,000 operations in 1985), Opinion, App. A, p. 5, it follows that by 1985, *both* the Reef Runway and the existing runway will be employed to full capacity.

The Federal Respondents herein considered the EIS prepared under NEPA as constituting the "public record" of the mandated "full and complete review" of alternatives by the Secretary required by AADA, Tr. 758, 789-90, 829, and added thereto only a one paragraph conclusionary letter dated January 21, 1972 from the FAA Regional Director, that "After careful and thorough consideration of the facts contained herein [i.e., in the EIS], . . . it is the finding of the undersigned . . . that there is no feasible and prudent alternative to the requested action *which has not been considered. . . .*" D-27 in evidence below (emphasis supplied).

The Secretary thus not only misread the requirement of §16(c)(4), he made none of the findings required by *Overton Park*. Moreover, the EIS, as the "public record", contains no mention whatsoever, let alone discussion, of the several alternatives that the record indicates *do* exist, have in fact been employed successfully at other airports, and indeed have been endorsed by the very same Secretary on another occasion as having significance "to the nation as a whole".[10] Indeed, the "public record" of the review proceeding reveals no point at which these alterna-

[10] "The Jamaica Bay-Kennedy Airport, a Multi-Disciplinary Environmental Study", in evidence as P-4(a) and P-4(b). This study, which discussing in detail the use of non-construction alternatives only at Kennedy Airport, was endorsed by then Secretary of Transportation John A. Volpe in a letter attached to it dated March 13, 1970 as having significance "not only to the immediate New York situation, but to the nation as a whole . . . ." P-4(a), page xiii; Tr. 405.

tives were considered and rejected after enactment of Section 16(c)(4).[11]

The Ninth Circuit's cramped interpretation of §16 (c)(4) conflicts in principle with the broad and expansive interpretation emphatically and unanimously given the identical Department of Transportation Act language by this Court in *Overton Park*. The court simply incorporated its previous rulings with respect to alternatives under NEPA, and concluded that the Secretary of Transportation "could have *reasonably believed* that in this case there are no feasible alternatives or that alternatives do involve unique problems", Opinion, App. A, p. 30, quoting from *Overton Park, supra,* at 401 U.S. 416 (emphasis in Opinion, but not in *Overton Park*), and that the Secretary's action was not arbitrary or capricious.

If the decision below is permitted to stand, the goals of §16(c)(4) will be defeated. The Court of Appeals, by stressing the "could have reasonably believed" branch of the *Overton Park* standard and ignoring the equally important requirement that the reasonable belief be based on consideration of "all relevant factors", in effect turned the FAA's omissions in this case into a ground for upholding the agency's action. This standard of review could wreck the statutory scheme by allowing agencies to approve environmentally harmful actions to which feasible

[11]Any rejection of an alternative which occurred prior to enactment of §16(c)(4) in May 1970 could not qualify as a valid ground for the required finding, since it may have been based on an entirely different standard.

and prudent alternatives exist simply by ignoring those alternatives throughout the review process.[12]

A rule that would accord with the statutory purpose of Section 16(c)(4) and with *Overton Park* is that when no evidence appears in the public record that a rejected alternative is not feasible and prudent, and plaintiffs present *prima facie* evidence that it is, the burden then shifts to the defendant official to explain further the reasons for his decision. Only thus can the court be assured that all relevant factors were considered and that the decision was not arbitrary or capricious.

III. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT IN GREENE COUNTY PLANNING BOARD v. FPC, 455 F.2d 412 (2nd Cir. 1972), cert. denied, 409 U.S. 849 (1972) AS TO WHETHER THE PREPARATION OF AN EIS MAY BE DELEGATED TO A PRIVATE COMPANY WITH A DIRECT FINANCIAL INTEREST IN AN AFFIRMATIVE DECISION ON THE PROPOSED PROJECT WHICH IS THE SUBJECT OF THE EIS.

NEPA requires that the "detailed statement" be prepared by the "responsible official" of the Federal agency involved. 42 U.S.C. §4332(2)(C).

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[12]The magnitude of planned airport development in the United States underlines the significance of this issue: 349 impact statements on file with the President's Council on Environmental Quality (CEQ) through September 30, 1973 involved airport projects, see 102 Monitor, Environmental Impact Statements, Vol. 3, No. 9, page 178 (Oct. 1973) (Published by the CEQ); in purely monetary terms, projected major airport development costs for the next ten years in the states included within the Ninth Circuit (including Guam) amounts to $997,756,000.00; the nation-wide figure is $4,342,238,000.00. See Federal Aviation Administration, 1972 National Airport Systems Plan (NASP), pp. 30-1.

In this case, however, a private consultant, the Ralph M. Parsons Co., which, as the Ninth Circuit found, Opinion, App. A, p. 13 did and does have a "financial interest in the affirmative decision on the proposed project", (to wit, 15.5% of the total project cost, or nearly $11,000,000), actively participated in the preparation of the EIS. *Ibid.* The court found nothing wrong in this, holding that a "firm with a financial interest in the project may . . . assist with the drafting of the EIS". *Ibid.*

On the other hand, the court stated, at p. 15, that the participation by the FAA in the preparation of the EIS "precludes us from concluding that there was any improper or illegal delegation in this case". This statement is somewhat bewildering, since, as indicated above, Petitioners were precluded by the trial court from developing the relative extent of participation in the preparation of the Reef Runway EIS by the FAA, the State of Hawaii, and Parsons.

In any event, the Ninth Circuit is now in conflict with the law of the Second Circuit as set forth in *Greene County Planning Board v. Federal Power Commission,* 455 F.2d 412, 420 (2nd Cir. 1972), cert. denied, 409 U.S. 849 (1972). *Greene County* held that NEPA prohibits the Federal Power Commission from delegating the task of preparing an EIS to the applicant for a license to construct the very project which is the subject of the EIS, on the grounds that such a procedure creates "the potential, if not the likelihood, that the applicant's statement

will be based upon self-serving assumptions", *Id.* at 420. *Greene County* has been expansively interpreted within the Second Circuit. See *Conservation Society v. Secretary of Transportation*, 362 F.Supp. 627, 629-32 (D.Vt. 1973) (presently on appeal) (*held*, a violation of NEPA for Federal Highways Administration to delegate to the Vermont Department of Highways the task of drafting the EIS for a highway, *even though* the federal agency consulted with the drafters at all stages, commented upon the draft as it progressed, and adopted the final product as its own).

The extent of federal participation required by NEPA in the preparation of an impact statement is an issue of fundamental importance because it effects most agency procedures for the preparation of such statements. The conflict in the circuits therefore results in an intolerable situation: agencies must tailor their NEPA procedures for similar projects in different parts of the country so as to satisfy conflicting demands.

Moreover, apart from the express statutory requirement, strong policy reasons dictate that an EIS be prepared by the "responsible official". An EIS must be as neutral and objective as possible, since its basic purpose is not to justify a decision already made on a proposed project, or even to influence a positive decision thereon, but rather is to provide both the agency and the ultimate-decision makers with an objective survey of the environmental consequences of and the alternatives to the proposed action, with which information an environmentally informed

decision may be made, uninfluenced by strictly monetary interests.[13] Thus the very integrity of the impact statement procedure, and therefore of NEPA itself, is at stake. See generally, Comment, *Delegation of the Drafting of Environmental Impact Statements,* 2 E.L.R. 10153 (1973).

If federal agencies are permitted to entrust preparation of impact statements to self-interested private contractors, the objective look at environmental impacts and alternatives which Congress considered so important is not likely to occur. In this case, for example, the consultant to whom the preparation was entrusted had a substantial interest in additional runway construction, and many alternatives not involving construction were therefore quite naturally not even mentioned in the EIS.

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[13]While it may be permissible for the federal agency to delegate the preparation of the EIS to the state agency involved, see, e.g., *Iowa Citizens v. Volpe*, ... F.Supp., ..., ..., 4 E.R.C. 1755, 1759, 3 E.L.R. 20013, 20015-6 (S.D. Iowa 1972), for the state agency in turn to delegate such task to a private party with an enormous monetary stake in the project surely goes beyond the intent of Congress. For the financial conflict of interest involved herein is to be distinguished from what might be termed a "mission interest" or an "institutional bias" had by federal or state officials who are proposing a project, see *Sierra Club v. Froehlke*, ... F.2d ....., ..., 5 E.R.C. 1920, 1922, 3 E.L.R. 20823, 20825 (7th Cir. Oct. 2, 1973): Parsons stood to lose several million dollars if a decision were made not to proceed with the Reef Runway, whereas the Federal and State protagonists retain their positions and continue to receive their salaries regardless.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
MICHAEL R. SHERWOOD,
Counsel for Petitioners.

HART, SHERWOOD, LEAVITT,
BLANCHFIELD and HALL,
Of Counsel.

January 8, 1974.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 73-1784

Life of the Land; Hawaii Audubon Society; Friends of the Earth; Sierra Club; Raymond Catania; J. Abraham Pasadaba; Wilfred H. Paul, Jr.; and Pete Kaululaau G. Thompson,

Appellants,

vs.

Claude S. Brinegar, Individually and in his capacity as Secretary of the United States Department of Transportation; John Shaffer, Individually and in his capacity as Administrator, FAA National Office; Jack Webb, Individually and in his capacity as Administrator, FAA, Pacific Region; Fujio Matsuda, Individually and in his capacity as Director, Hawaii Department of Transportation,

Appellees,

and

Kalihi-Palama Community Council, James Y. Muraoka, Takeshi Uyesugi, General Contractors Association of Hawaii, a non profit Hawaii Corporation, and Dillingham Corporation, a Hawaii corporation, dba Hawaiian Dredging and Construction Company,

Intervenors-Appellees.

[September 10, 1973]

OPINION

On Appeal from the United States District Court
for the District of Hawaii

Before: HAMLIN and TRASK, Circuit Judges,
and BELLONI, District Judge*

INTRODUCTION

This environmental law case is an appeal from the Final Decision and Order of the United States District Court for the District of Hawaii, holding that appellees have complied with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § § 4321 *et seq.*, and the Airport and Airways Development Act of 1970 (AADA), 49 U.S.C. § § 1701, *et seq.*, and denying appellants' prayer for a permanent injunction sought against the Secretary of Transportation and other officials in connection with the construction of the reef runway extension (Reef Runway project) at the Honolulu, Hawaii, International Airport (HIA).

We affirm, concluding that appellees have satisfied the provisions of both NEPA and AADA.

THE PARTIES

Appellants, plaintiffs below, are four environmental organizations[1] purportedly "concerned with the pres-

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*The Honorable Robert C. Belloni, United States District Judge, Portland, Oregon, sitting by designation.

[1]The environmental groups, all non-profit organizations, are Life of the Land, Hawaii Audubon Society, Friends of the Earth, and Sierra Club. The National Audubon Society has submitted an *amicus* brief.

ervation of our natural environment," and four named individual residents of areas affected by flight patterns of aircraft arriving and departing from HIA. Appellants all claim to suffer adverse and irreparable injuries as a result of specific and allegedly illegal acts committed by appellees.[2]

Appellees, defendants below, are the Secretary of Transportation,[3] as the federal official ultimately responsible for federal involvement in the Reef Runway project; two named individual administrators of the Federal Aviation Agency said to have been contributors to the Secretary's alleged malfeasance or nonfeasance; and the director of the Hawaii Department of Transportation, as the state official ultimately responsible for prosecution of the project.

Permitted to intervene as defendants below were the Dillingham Corporation, the contractor which has been awarded the construction contract on the proposed project; two named individuals who reside in areas affected by overflights to HIA, and the Kalihi-Palama Community Council, Honolulu, representing other residents of those areas.

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[2]Appellees below did not question, nor did the district court consider, the propriety of appellants' standing to maintain this action. We are satisfied, however, that appellants are properly before this court. *See United States v. SCRAP*, ... U.S. ..... (June 18, 1973) (slip opinion at 13-19). *Cf. Sierra Club v. Morton*, 405 U.S. 727 (1972); *San Francisco Tomorrow v. Romney*, 472 F.2d 1021, 1023-24 (9 Cir. 1973).

[3]At the time of this suit's initiation in the district court, John A. Volpe was the Secretary of Transportation. He has subsequently been replaced by Claude S. Brinegar.

THE DISTRICT COURT PROCEEDINGS

On November 8, 1972, one day before the scheduled opening of bids for construction of the Reef Runway project, this action for injunctive relief was filed by appellants in the United States District Court for the District of Hawaii. Upon said filing, the district court issued a Temporary Restraining Order.

A hearing on appellants' motion for a preliminary injunction was held from December 13, 1972, to December 22, 1972. On the latter date, the district court denied the prayer for a preliminary injunction and dissolved the Temporary Restraining Order previously entered.

On March 29, 1973, trial was held on the merits, at at which time the evidence of the previous hearing was incorporated as if adduced at that time. Additional testimony was also presented.

On April 13, 1973, the district court filed its Final Order and Decision, denying appellants' prayer for a permanent injunction. The district court also denied appellants' motion for an injunction pending appeal.[4]

After filing a timely notice of appeal, appellants on April 27, 1973, sought an injunction pending appeal to this court. On June 11, 1973, after oral argument, we granted that motion. On August 7, 1973, we heard oral argument on the merits, and the case was submitted for decision.

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[4]In its Final Order and Decision, the district court incorporated by reference the reasoning set forth in its December 22, 1972, Decision and Order. The latter is reported at ..... F.Supp. ..... (D. Haw. 1972).

BACKGROUND OF THE PROPOSED PROJECT

There was evidence before the district court supporting the following statement of facts.

Hawaii is approximately 2,400 miles from the continental United States. Over 99 per cent of all passengers travel to and from Hawaii by aircraft, and the Honolulu International Airport has consequently assumed the status of that state's principal gateway. Further, due to its unique location, HIA is the third largest point of entry for international arrivals in the United States. During labor disputes involving marine transport, HIA takes on special importance, as aircraft become the sole means of shipping and receiving cargo.

HIA serves not only the personal and commercial interests of Hawaii and the nation, but is also vital to the military. With the closing of adjacent Hickam Air Field, the United States Air Force engages in substantial operations at HIA. Of the over 250,000 operations (a landing or take-off) at the airport in fiscal 1971, military operations accounted for 52,221, with 113,701 commercial operations, and 89,992 for general aviation.[5]

HIA is presently operating at capacity levels during peak hours. Forecasts indicate that the number of aircraft operations will increase to 382,000 by 1975, at which time HIA is expected to reach and surpass both hourly and annual capacity levels, and to 493,000 by 1985.

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[5]HIA is 32nd in small craft operations.

Accompanying projected increases in aircraft operations at HIA has been an increasingly disturbing problem of aircraft noise pollution. This noise problem, which first appeared in substantial form with the introduction of jet aircraft around 1960, is accentuated because of the airport's location in close proximity to densely populated residential areas, and to downtown business sections. Further, the prevailing trade winds, which affect aircraft landings and take-offs, complicate the problem.

Increasing operations by jet aircraft have also enhanced the danger of a disaster in the event of a landing or take-off accident. There is evidence that jet aircraft mishaps most often occur within forty seconds after take-off, or about 1.6 miles from the end of the runway. In the case of HIA's present configuration, this would place the aircraft in the midst of the Kalihi-Palama residential neighborhood.

In 1961 or 1962, public concern encouraged investigations of potential solutions, including that of simply moving the jet aircraft seaward, away from human habitation.

In 1962, subsequent to the State Legislature's passage of a resolution reflecting official concern for HIA's noise problem, the state authorized preparation of a report on means to alleviate the problems concomitant with the introduction of jet aircraft at HIA. This early study resulted in the recommendation of the construction of a "Seaward Jet Runway," a proposal which was, however, never implemented because its unfavorable alignment with prevailing winds made it too hazardous to use.

In 1967, consultants were authorized by state officials to prepare a plan for future development of HIA. These consultants recommended the construction of a runway to be located 1,300 feet south and parallel to the existing runway. This plan was in turn submitted to a citizens' Task Force committee, appointed by the Governor of Hawaii. Committee members included responsible local, state and federal officials, and members of the general public. Beginning in February, 1967, and continuing through April, 1970, the Task Force committee met monthly on some 46 or 47 occasions to consider various aspects of the runway construction proposals. These meetings were for the most part open to the public, and publicized in the news media. Included in these discussions were considerations of possible alternatives to, and environmental effects of, the proposed new runway.

The Task Force committee's work culminated in a June, 1968, recommendation that there be constructed what is essentially the project here at issue—a new 12,000 foot long runway on filled reefland, located 6,700 feet south of the existing runway. Such a runway would largely eliminate the spectre of a disastrous aircraft accident in a populated residential area, and would also reduce noise pollution by moving it more than a mile away.

In September, 1968, airline representatives to the Task Force committee commissioned their own study, which concluded that the proposed runway was unnecessary, and that the noise problem could be effectively alleviated with an extension of the existing runway, and the construction of a shorter runway for

inter-island traffic. After review and discussion, the Task Force committee in January, 1970, concluded that the airline proposal provided insufficient benefits to justify a change from the plan of the Reef Runway concept. The final recommendation of the Task Force committee in favor of the Reef Runway was approved by the Governor of Hawaii in February, 1970.

In order to fund the project, the state applied to the Federal Aviation Agency for a matching 50-50 grant pursuant to the Airport and Airways Development Act of 1970, 49 U.S.C. § 1701 *et seq.* In compliance with that statute, a hearing was held on the proposed Reef Runway in Honolulu on March 22, 1971. Life of the Land and the Hawaii Audubon Society, two of the appellants herein, appeared at the hearing, urging consideration of measures to protect a rare water bird endangered by the proposed project.

The Federal Aviation Agency and the State of Hawaii are presently committed to the construction of the Reef Runway. It is to be located in Keehi Lagoon, Manala Bay, south of the existing runway system. The project, whose estimated cost is upwards of $60 million, is scheduled to be completed in two increments by 1975.

There is nothing in the record indicating that the planners of the project believed, or had reason to believe, that the project would have an irreparably deleterious effect upon the environment. On the contrary, the possibility of various environmental side benefits, such as reduction of air and water pollution,

enhancement of recreational boating facilities and improvement in area fishing, see *infra*, were all hopefully anticipated.

THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, became effective on January 1, 1970. The Reef Runway project is conceded by appellees to be a "major federal action, significantly affecting the quality of the human environment," and is therefore subject to compliance with that statute.

NEPA, termed by one court "the broadest and perhaps most important" of recent federal environmental legislation, *Calvert Cliffs' Coordinating Committee, Inc. v. United States AEC*, 449 F.2d 1109, 1111 (D.C. Cir. 1971), "essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment." *Zabel v. Tabb*, 430 F.2d 199, 211 (5 Cir. 1970). *See generally, Calvert Cliffs', supra*, 449 F.2d at 1111 *et seq.*

To insure that environmental ramifications of proposed projects are properly considered by those responsible for their implementation, section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C)[6] requires that an environmental impact statement (EIS) be prepared to "assess adverse environmental effects and

[6]Section 102(2)(C) of NEPA provides in part:

"Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered

discuss alternatives to the proposed action." *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 786 (D.C. Cir. 1971). As such, the EIS "provides a basis for (a) evaluation of the benefits of the proposed project in light of the environmental risks, and (b) comparison of the net balance for the proposed action with the environmental risks presented by alternative courses of action." *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972).

Compliance with NEPA's requirement that an EIS be prepared required the officials involved to essentially duplicate in the form of more formalized studies the accumulated considerations of the preceding several years of investigation and planning, which we have described, *supra*.[7] Preparation of the EIS com-

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in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall——

• • •

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on——

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

• • •"

[7]NEPA does not apply retroactively, but it is applicable to continuing or on-going federal projects commenced prior to January 1, 1970. *Lathen v. Volpe*, 455 F.2d 1111, 1116, 1121 (9 Cir. 1971). The cases are collected in *Citizens Organized to Defend the En-*

menced in December, 1970, and continued until the draft environmental statement was sent out for comments on September 23, 1971. Participating in the writing of the draft EIS were federal and state officials, and employees of the Ralph M. Parsons Company, a private consulting firm. After comments were solicited and received from numerous federal, state and local agencies, private organizations (including three of the appellants), and interested individuals, the team returned to work and prepared the final EIS for official approval and submission to the Council on Environmental Quality (CEQ).

The final EIS, dated January, 1972, was approved by the Federal Aviation Agency's regional director, in connection with his obligation under AADA. On January 21, 1972, the director transmitted the EIS and the comments thereon to the Federal Aviation Agency's Washington, D.C. headquarters, for the approval of the Department of Transportation's Assist-

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vironment, Inc. v. Volpe, 353 F.Supp. 520, 538 (S.D. Ohio 1972) and *Sierra Club v. Froehlke*, 359 F.Supp. 1289, 3 ELR 20248, 20259 (S.D. Tex. February 16, 1973).

NEPA does not contemplate that the decision to proceed with the project be first made by the officials involved, subsequent to which the EIS is prepared as a mere technicality in fulfillment of the statute. Here, however, the federal and state officials involved had contemplated and acquiesced in proceeding with the Reef Runway project before NEPA's passage. The fact that EIS was here prepared after a decision to proceed with the runway project had been made is attributable to the timing of NEPA's effectiveness. We reject the implication made by appellants' counsel at oral argument that the appellees have undermined the thrust of the statute. To the contrary, there is ample evidence in the record indicating that appellees have acted in a good faith attempt to comply with both the spirit and letter of NEPA. *See City of New York v. United States*, 344 F.Supp. 929, 938 (E.D. N.Y. 1972).

ant Secretary for Environment and Urban Systems.[8] The Assistant Secretary approved the EIS on February 29, 1972, and transmitted it to the CEQ on March 1, 1972.

The EIS totals 46 pages, plus appendages. It sets forth four purposes for construction of the Reef Runway project: (1) Reduction of the level of aircraft noise over metropolitan Honolulu, and the Kalihi-Palama area, adjacent to HIA, in particular; (2) improvement in safety by moving operations seaward and away from populated areas in the event of aircraft accidents; (3) increasing airfield capacity to provide for efficient handling of the increasing traffic; and (4) providing an alternative runway during periods when the existing principal runway is under repair.

The major thrust of this appeal is appellants' contention that the preparation, contents and distribution of the EIS failed to comply with NEPA requirements. We will examine the specifics of the EIS in our discussion and disposition of this contention.

Delegation of the EIS' Preparation

Appellants first assert that the preparation of the instant EIS was improperly delegated to a private consulting firm which had a major and direct con-

[8] As reasonably interpreted, NEPA does not require the Secretary of Transportation to *personally* review and approve every EIS submitted to Washington. *Cf. United States v. King*, ___ F.2d ___ (9 Cir. February 28, 1973) (delegation of authority to authorize intereception of oral and wire communications pursuant to 18 U.S.C. § 2516).

tingent financial interest in the Reef Runway's construction.

In June, 1968, the state appellees entered into a contract with Ralph M. Parsons Company (Parsons), a private consulting firm, whereby Parsons agreed to render management consultant services for the engineering, design and construction of the Reef Runway project. According to the contract terms, Parsons was to receive a "Guaranteed Maximum Compensation" which consisted of "15.5% of the Estimated Total Project Cost." The contract defined "project" as "construction, ready for operation by state," of five components, one of which was the Reef Runway.

It does appear from the record that Parsons had a financial interest in an affirmative decision on the proposed project. We find nothing, however, in either the wording of NEPA or the case law, which indicates that, as a matter of law, a firm with a financial interest in the project may not assist with the drafting of the EIS. As the Eight Circuit has indicated, compliance with section 102 of NEPA is based upon good faith objectivity rather than subjective impartiality. *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 296 (8 Cir. 1972), *aff'g* 342 F.Supp. 1211 (D. Ark. 1972). *See also Sierra Club v. Froehlke*, 359 F.Supp. 1289, 3 ELR 20248, 20268 (S.D. Tex. February 16, 1973).

Appellees concede that under NEPA, the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of section 102(2) (C). We find no de-

parture from this requirement here. The record indicates that Federal Aviation Agency officials actively participated in all phases of the EIS preparation process. The chief of the Airport Division of the Federal Aviation Agency's Pacific Region testified that he assisted with the preparation from its early stages onward. He stated that, as part of the preparation, regular meetings with other federal officials, State of Hawaii officials, as well as the Parsons representatives, were held. Further, an employee of Parsons testified as to the active involvement of the Federal Aviation Agency in the EIS preparation process. The Parsons employee concluded that the EIS "was more or less a joint effort by Parsons, the State and the F.A.A."

The record further reveals that federal officials in Washington, upon receipt of the EIS, continued active examination thereof.

We agree with the district court's conclusion that "the evidence shows that F.A.A. officials did in fact work together with state officials and a private contractor and gave it close attention." The case law dealing with the delegation of EIS preparation has heretofore been limited to federal agency delegation to a state agency, and has permitted such delegation where the federal agency significantly participated in the preparation of the EIS. *See Citizens for Mass Transit Against Freeways v. Brinegar*, 357 F.Supp. 1269 (D. Ariz. 1973); *National Forest Preservation Group v. Volpe*, 352 F.Supp. 123 (D. Mont. 1972). Unlike *Greene County Planning Board v. F.P.C.*, 455 F.2d 412, 420 (2 Cir.) *cert. denied* 409 U.S. 852 (1972)

and *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation,* ..... F.Supp. ....., ... (D. Vt. July 27, 1973) (opinion at 6), the federal agency here involved did not "abdicate a significant part of its responsibility" to another organization.

While Parsons may have assisted in the EIS' preparation, the significant and active participation by the F.A.A. therein precludes us from concluding that there was any improper or illegal delegation in this case.[9]

Publication and Dissemination of the EIS

Section 102(2) (C) of NEPA, 42 U.S.C. § 4332(C), provides in part:

> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and *shall accompany* the proposal through the existing agency review processes; (emphasis added)

It is uncontested that the comments to the draft statement were not attached to the final EIS and

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[9] *Lathan v. Volpe*, 455 F.2d, *supra*, at 1122, 1126, relied upon by appellants, is not apposite. There, no EIS statement had been prepared.

further, that the FAA failed to include within the EIS the text of all references used in the statement's preparation. Appellants urge that these omissions render the EIS legally insufficient. We disagree.

The federal agency comments: These comments to the draft statement were compiled as a separate document. The comments did, however, follow the proposal through the agency review process, as required by NEPA. *See Monroe County Conservation Society, Inc. v. Volpe,* 472 F.2d 693, 698 (2 Cir. 1972). The record indicates that the comments were submitted to the Assistant Secretary of Transportation for Environmental and Urban Systems. The Comments were subsequently forwarded to the Council on Environmental Quality and the National Technical Information Service, where they became a part of the public record. In *Monroe County, supra,* relied upon by appellants, the court noted that "there is no indication that [the comments] accompanied the statement through the review process." 472 F.2d at 698.

References to the EIS: Appellants also assign error to the fact that the F.A.A. failed to include within the EIS the text of all 22 references used in the statement's preparation.

The record indicates that these references consisted of approximately 2,000 pages of technical material. They were kept on file and made available at the F.A.A.'s regional office in Honolulu. The appellants had ready access to these documents, and did in fact avail themselves of them. The references were also available for forwarding to Washington upon request.

Appellants' insistence that the federal agency comments and technical references *physically* accompany the EIS is an attempt to place form over substance. We have previously rejected such tactics in the NEPA context. *See Jicarrilla Apache Tribe of Indians v. Morton,* 471 F.2d 1275, 1283-85 (9 Cir. 1973). As one court has indicated, "[NEPA] must be construed in the light of reason." *N.R.D.C. v. Morton, supra,* 485 F.2d at 837.

There was no error in either the publication or dissemination of the EIS in this case.

Substantive Content of the EIS

Appellants further contend that the EIS is substantively inadequate, and have submitted voluminous briefs in support of their argument. Appellants' substantive attack on the EIS encompasses assertions that the statement fails to discuss the proposed runway's environmental consequences of increased population and air pollution, fails to discuss "non-construction" alternatives to the project, and inadequately discusses those alternatives which are considered. Further, appellants assert that the EIS discussion of the runway's environmental effects upon noise pollution, water quality, recreation and wildlife is inadequate.

Standard of Review: Agency action under NEPA is subject to judicial review pursuant to § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See Environmental Defense Fund v. Corps of Engineers, supra,* 470 F.2d at 298-99, n.14; *Town of Groton v. Laird,* 353 F.Supp. 344, 348 (D. Conn.

1972). As such, a reviewing court may set aside agency action which is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971). *See also Scenic Hudson Preservation Conference v. F.P.C.*, 453 F.2d 463, 467 (2 Cir. 1971), *cert. denied* 407 U.S. 926 (1972). *Cf. Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465-66 (5 Cir. 1973). As we recently stated in *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1281 (9 Cir. 1973):

> "Reversal of a substantive decision is appropriate only to situations where 'the actual costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental factors.'" (citation omitted) *See also, Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 352-53 (8 Cir. 1972); *N.R.D.C., Inc. v. Morton, supra*, 458 F.2d at 838.

We examine appellants' substantive challenges, therefore, mindful of the circumscribed nature of our review.

Demographic Effects: Appellants argue that the EIS is inadequate in that it fails to include a study of the effect of the Reef Runway project upon the population of Honolulu and Hawaii. Appellants contend that a major incentive behind construction of the Reef Runway is Hawaii's need to accommodate and encourage increased tourism to the state. Appellants then posit that the effect of increased tourism will be to increase the *permanent* population of Honolulu, to the detriment of the local "quality of

life." Hence, they argue that the EIS must contain an analysis of the demographic effects of the project.

We reject this reasoning. That an increase in Honolulu's tourism will result in an increase in that city's permanent population is speculative. Certainly, there in no empirical data in the record supportive of the allegation. We agree with the district court's conclusion that "requiring the kinds of demographic discussion suggested by [appellants] is unreasonable in the context of this project."

Hanly v. Mitchell, 460 F.2d 640 (2 Cir.), *cert. denied* 409 U.S. 990 (1972) and *Lathan v. Volpe*, 350 F.Supp. 252 (W.D. Wash. 1972) where EIS discussions of demographic ramifications of the projects in issue were held to be warranted, are factually distinguishable. *Hanly* involved the proposed construction of a prison detention facility in New York City, while *Lathan* involved the proposed construction of a highway through a populated Seattle area. In both cases, the proposed project could reasonably be projected to have an effect upon local population patterns to a degree not evidenced here.[10]

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[10]In *Hanly v. Mitchell*, *supra*, the court noted, 460 F.2d at 642:

"Plaintiffs are all living members of the Chatham Square Civic Community for a Planned Community, a non-profit group concerned with the development and protection of that portion of lower Manhattan called the Civic Center. Although the area contains many government buildings, including several courthouses, surprisingly at least 50,000 people live there and in adjacent Chinatown. Included in that group are over 3,000 persons living in approximately 660 cooperative apartment buildings called Chatham Towers and Chatham Green. These face the proposed new jail, some 100-150 feet away."

In *Lathan v. Volpe*, *supra*, the proposed highway was described as follows, 350 F.Supp. at 263:

Air Pollution: It is agreed by all parties that no studies were made of the effect of the Reef Runway project upon air pollution. The failure to conduct such a study, however, was not an inadvertent omission. Rather, a threshold decision was made by federal and state officials that air pollution studies were unnecessary in this specific case because of the very nature and location of the proposed project.

The Reef Runway will relocate aircraft take-offs, the major source of aircraft air pollution, 6,700 feet seaward, and away from the populated areas of Honolulu. The essence of this project, therefore, involves moving the sources of the air pollution away from people. The federal and state officials concluded that detailed air pollution studies were unnecessary, on the premise that at the very least, the project was extremely unlikely to worsen the air quality in any relevant sense.

Further, appellants do not claim that the project will deteriorate the existing air quality; rather, they

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"The proposed segment involved herein would create a ten-lane highway along the alignment of an existing four-lane highway. It would cross Lake Washington from the east on a floating bridge, enter Seattle by a tunnel through the Mount Baker district, emerge and continue through a heavily populated area, and join I-5, a north-south interstate highway." See also *Lathan v. Volpe*, *supra*, 455 F.2d 1114, where we noted that this highway ran "through a densely populated, low income, city area; * * *."

Similarly distinguishable is *Sierra Club v. Froehlke*, *supra*, 3 ELR at 20271-20272, where the court observed that "there is reason to believe that there will be development, growth and industrial expansion as a result" of the project there in issue. As we note in the text, appellants' contention that the Reef Runway project will result in expansion of the permanent population of Honolulu is mere speculation, unsupported by the record.

urge that a detailed study may conceivably reveal that anticipated environmental improvement may be less than expected.

The district court acknowledged that the EIS may well have set forth in more detail the reasoning leading to the conclusion that there were no significant air pollution problems inherent in the project. But, on the record as a whole, we are unable to conclude that the district court erred in rejecting appellants' air pollution arguments.

Alternatives: Section 102(2)(C) (iii) of NEPA, 42 U.S.C. § 4332(2)(C) (iii), requires that the EIS include a discussion of "alternatives to the proposed action." *See* CEQ Guideline, § 62 (iv), 36 Fed. Reg. 7725 (1971). Appellants contend that the EIS here "fails completely to discuss some reasonable and feasible alternatives to the proposed action," and "treats other alternatives in insufficient detail."

The EIS contains a brief discussion of four alternatives to the proposed construction of the Reef Runway extension. Three involve various runway concepts and configurations, and the fourth, the alternative of taking no action.

In support of their allegation that the alternatives which were considered were insufficiently treated, appellants introduced at trial testimony calculated to discredit certain data considered in rejecting only one alternative—that of extending the existing runway back into adjoining Hickam Air Field.[11] The planners,

[11]The other construction alternatives considered were construction of the "Seaward Jet Runway," and construction of a close-in

in addition to concluding that this alternative would create more noise than it would alleviate, noted that the replacement cost to the military would be $37 million. At trial, appellants introduced evidence indicating that this figure was inflated. No other evidence on the subject of alleged insufficiently treated alternatives was offered. There is, for instance, no allegation that an important consideration in connection with a given alternative was ignored. We find no error in the EIS' discussion of alternatives.

In addition to challenging the disposition in the EIS of alternatives which were in fact considered, appellants further contend that there exist alternatives not considered which could well accomplish the objectives of the Reef Runway project. These alleged alternatives are identified by appellants as "non-construction alternatives," which they defined as "those arrangements for managing airports as to questions like noise and capacity and air pollution which do not involve the building of new structures."

For instance, appellants suggest removal of the Air Force's KC-135 jet tankers, the loudest of the aircraft operating from HIA, to an adjacent airfield. There is, however, evidence indicating that the Air Force had refused to move its jet tankers to another base, effectively eliminating implementation of this alter-

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parallel runway. Both were rejected because of inability to alleviate the noise and safety problems.

The alternative of taking no action was rejected because, without the proposed project, high noise levels would continue unhampered, and the problems of safety would remain unsolved. Further, the failure to provide for the expected growth in airport traffic would result in increasing delays.

native. Further, removal of the jet tankers would obviously do little to alleviate the significant noise pollution and safety problems attributable to commercial aviation.

Another alternative urged by appellants is the imposition of higher landing fees at HIA, in the hope of reducing commercial aircraft traffic. This alternative was considered early in the planning process, but rejected as ineffectual inasmuch as attempts at other airports to reduce traffic by such means have proven unsuccessful.

Appellants further suggest that private aircraft be transferred to another airfield. Again, however, such a transfer would have no effect upon the noise and safety problems presented by larger aircraft. It further appears that a ban on general aviation would violate legal agreements entered into by HIA, guaranteeing the airport's accessibility to all users.

Appellants also urge that the inter-island aircraft operating out of HIA could be required to commence their take-offs at a different point on the present runway configuration, thereby eliminating the noise problem. The record, however, indicates that only a minor percentage of the aircraft operating at HIA would be affected by this alternative, and it would therefore have only a token effect on the over-all situation.

Finally, there is nothing in the record to indicate that alternatives such as the readoption of airline schedules, imposition of curfew restrictions,[12] or con-

[12] At any rate, the state is apparently without constitutional authority to impose aircraft curfew restrictions. *City of Burbank v. Lockheed Air Terminal*, ... U.S. ..... (May 14, 1973).

version to wide-body aircraft design are either reasonable or feasible alternatives in this case.[13]

NEPA's "alternatives" discussion is subject to a construction of reasonableness. *N.R.D.C., Inc. v. Morton, supra,* 458 F.2d at 834. Certainly, the statute should not be employed as a crutch for chronic fault-finding. Accordingly, there is no need for an EIS to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative. *Id.* at 834. Rather, the EIS need only set forth those alternatives "sufficient to permit a reasoned choice." *Id.* at 836. This has been done. *See also Committee for Nuclear Responsibility, Inc. v. Seaborg, supra,* 463 F.2d at 787; *Pennsylvania Environmental Council v. Bartlett,* 315 F.Supp. 238, 250 (M.D. Pa. 1970).

Appellants also challenge the adequacy of the EIS' discussion of the Reef Runway's impact upon the human and natural environment. They challenge statements as unsupportable, contradictory and factually erroneous. We examine these contentions, again mindful of the limited scope of our review, *supra.*

Noise Pollution: Appellants do not assert that the project will have an adverse effect upon the environment by increasing noise pollution. Indeed, a prime reason for the Reef Runway project is to reduce the level of jet noise in the areas adjacent to HIA.

The EIS does discuss and graph the noise situation in some detail. There is substantial evidence in the

[13] We reject appellants' implication that various techniques utilized at other airports in the continental United States are necessarily adaptable to the unique situation existing at HIA.

record, including testimony by responsible federal officials, supporting the EIS' conclusion that the project will result in significant reduction of noise pollution.

Appellants' prime objection to the EIS' treatment of noise pollution is the omission therein of "on-site" noise measurement techniques. In lieu thereof, the F.A.A. utilized another well-recognized scientific technique, which rendered "on-site" measurement unnecessary. The record indicates that "on-site" measurements of independent organizations were in fact considered by the planners.

Undoubtedly, there exists a plethora of scientific studies which could have been, but were not, used to measure the noise pollution levels in the area involved. We cannot, however, conclude that the district court made a "clear error in judgment," *Citizens to Preserve Overton Park, supra,* 401 U.S. at 416, in concluding that "(t)he kinds of studies suggested by [appellants] may be useful but are hardly necessary."

Water Quality: The EIS, utilizing four scientific studies undertaken for the project, concluded that the project would result in an improvement of the water quality in the marine area adjacent to the Reef Runway.

At trial, appellant presented scientific studies and various letters from university professors purportedly contradicting the EIS' water quality conclusions.

One scientist testified that one of the studies referred to in the EIS, a report of a hydraulic study prepared under the auspices of the University of Hawaii, might be read as indicating a different con-

clusion from that given in the EIS. The record indicates, however, that this study was based upon a proposed configuration of the project which was subsequently changed. An analysis of the project based upon this new configuration was supportive of the hydraulic study.

Appellant also introduced letters at trial after testimony was terminated, which questioned certain data and conclusions relied upon in the preparation of the EIS' water quality analysis. Apart from the obvious observation that the letter writers were, for the most part, not available for cross-examination, we note that disagreement among experts will not serve to invalidate an EIS. Indeed, "(f)urther studies, evaluation and analyses by experts are almost certain to reveal inadequacies or deficiencies." *Environmental Defense Fund v. Corps of Engineers*, 342 F.Supp. 1211, 1217 (E.D. Ark. 1971), *aff'd* 472 F.2d 289 (8 Cir. 1972). The purpose of the EIS is to inform the decision makers of the environmental ramifications of the proposed action. *See Committee for Nuclear Responsibility v. Seaborg, supra*, 463 F.2d at 787. The statement need not achieve scientific unanimity on the desirability of proceeding with the proposed action.

Recreation: The EIS anticipates an enhancement of recreational boating facilities and an improvement in fishing conditions as a result of improvement in the water quality of Keehi Lagoon, *supra*, and the construction of channels to the open sea.

Appellants contend, however, that construction of the Reef Runway will result in "loss of surfing sites"

and "loss of the effective use of the proposed Sand Island Park due to high aircraft noise."

In support of the first allegation, appellants introduced at trial the tetimony of the founder of a local surfing club, who was described as an "out-reach" worker with disadvantaged youths. The witness testified that the youths feared the project might result in adverse surfing conditions. This was the sole evidence produced at trial supportive of the "loss of surfing site" arguments. The district court was understandably unpersuaded by this hearsay testimony.

The contention that use of a proposed nearby park will be adversely affected as a result of noise from aircraft utlizing the Reef Runway was adequately considered in the EIS.

On the record as a whole, we are unable to upset the district court's conclusion that the EIS adequately deals with the recreational aspects of the Reef Runway project.

Wildlife: The EIS acknowledges that the proposed project will have an adverse environmental effect upon certain wildlife. This is the only clearly documented adverse environmental effect of the project which could be said to be significant. The statement notes that the Reef Runway project will displace some 186 acres of silted coral mudflats used for feeding and roosting by birds, including the rare Hawaiian Stilt. Up to 100 of these endangered birds may be affected. Appellants' concern for the Hawaiian Stilt is the basis of their attack upon this aspect of the EIS.

The record indicates that the plight of the Stilts has continuously been a matter of concern to the planners of the project. As recommended by appellants, the replacement habitats at nearby Pearl Harbor Naval Station are being developed in conjunction with the project. Also included in the project itself is the construction of certain ponds and islets suitable for the birds at a cost in excess of $350,000. *Cf. Sierra Club v. Froehlke, supra*, 3 ELR at 20272.

The main contention of appellants here is that the size of the replacement habitats may prove to be inadequate. But the district court noted, and we concur, that if the size of the habitats do indeed prove to be inadequate, there is no reason why adjustments could not be made even if the construction as planned proceeds to completion.

The record indicates that the project's planners were concerned with, and took adequate steps to minimize, the harm presented to the birds. The discussion in the EIS of the project's environmental ramifications upon wildlife was adequate.

It is our conclusion that the EIS here in issue adequately complies with NEPA requirements.[14]

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[14] Appellants, noting that the EIS must stand or fall on its own merits, also contend that the district court impermissibly permitted the Federal Aviation Agency to "bolster" the document with "extrinsic evidence."

The record indicates otherwise. The "extrinsic evidence" was testimony showing why certain matters were not contained in the EIS, and was presented after appellants had challenged such deficiencies. The testimony was by "the administrative officials who participated in the decision * * * explaining their action." *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 420. There was no error.

AIRPORT AND AIRWAYS DEVELOPMENT ACT OF 1970

In addition to their NEPA contentions, appellants assert that appellees have failed to comply with the requirements of section 16(c)(4) of the Airport and Airways Development Act of 1970, 49 U.S.C. § 1716 (c)(4). We find this contention equally without merit.

Section 16(c)(4) of AADA requires, in pertinent part, that the Secretary of Transportation

> shall authorize no [airport extension] project found to have adverse effect unless (he) shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect.

The record indicates that the required finding was made as a product of lengthy review by federal officials. The finding is supported by the EIS which, one court has held, may itself be considered as a section 16(c)(4) finding. *Citizens Airport Commission of Chesterfield County v. Volpe*, 351 F.Supp. 52, 59 (E.D. Va. 1972).

There are virtually no cases indicating the standard of review a court must employ when analyzing compliance with section 16(c)(4). In *Citizens to Preserve Overton Park v. Volpe*, *supra*, however, the Supreme Court construed section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), which contains virtually the identical relevant lan-

guage of AADA.[15] The Supreme Court there stated that "the reviewing court must be able to find that the Secretary could have *reasonably believed* that in this case there are no feasible alternatives or that alternatives do involve unique problems." 401 U.S. at 416 (emphasis added). The Court further noted that, pursuant to section 702(2)(A) of the Administrative Procedure Act, the Secretary's action must not have been arbitrary or capricious. *Id.*

Incorporating the discussion of the adequacy of the EIS in our analysis of appellees' compliance with NEPA, we conclude that under the applicable standards of review, appellees have complied with AADA.

CONCLUSION

For the reasons stated herein, the injunction pending appeal is hereby dissolved effective immediately, and the judgment of the district court is

AFFIRMED.

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[15]Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), mandates that the Secretary of Transportation disapprove any project which requires the use of parklands unless "(1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area [etc.] * * *."

The relevant language in section 16(c)(4) of AADA reads "no feasible and prudent alternative exists," and "all possible steps have been taken to minimize" harm to the environment.

Appendix B

In the United States Court of Appeals
For the Ninth Circuit

No. 73-1784

Life of the Land, et al., Appellants,
v.
Claude S. Brinegar, et al., Appellees,
and
Dillingham Corporation, etc., Intervenor/Appellee.

[Filed Oct. 16, 1973]

ORDER

Before: HAMLIN and TRASK, Circuit Judges, and BELLONI, District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

*Honorable Robert C. Belloni, United States District Judge, Portland, Oregon, sitting by designation.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The panel has also voted to deny the motion to stay the dissolution of the injunction, and further, to deny the alternative motion for reinstatement of the injunction pending appeal.

Dated: October 15, 1973.

O. D. Hamlin,
United States Circuit Judge.

Appendix C

363 F.Supp. 1171 (1972)

United States District Court,
D. Hawaii.

Civ. No. 72-3683

Life of the Land et al., Plaintiffs,

v.

John Volpe, Individually and in his capacity as Secretary of the United States Department of Transportation, et al., Defendants,

and

Kalihi-Palama Community Council et al., Defendants-Intervenors.

Dec. 22, 1972.

DECISION AND ORDER

SAMUEL P. KING, District Judge.

This case involves the administrative steps taken in authorizing the Reef Runway Project at Honolulu International Airport.[1]

[1] "The proposed action involves Federal financial assistance pursuant to the Airport and Airway Development Act of 1970 to construct a new runway at Honolulu International Airport, Honolulu, Hawaii. The construction of this runway, generally referred to as the 'Reef Runway', consists of filling, grading and paving an airplane runway 12,000 feet long, 200 feet wide with a 1,000-foot long runway safety area on each end and 250-foot wide shoulders. The runway, to be located approximately 6,700 feet seaward of existing Runway 8-26, will include a protective structure 1,050 feet seaward of and parallel to the new runway to prevent storm wave damage." EIS page i.

The pending issue requires a decision as to whether a preliminary injunction shall be granted prohibiting further implementation of the project. A temporary restraining order was signed by Judge Pence just before the opening of bids for the construction of the runway. That order resulted in a suspension of the bidding process and is still in effect.

Plaintiffs are four organizations concerned with our natural environment and four individuals living in an area affected by this airport's operations. Defendants are the federal and state officials concerned with the project. Intervenors, as defendants, are the contractors who submitted bids for the construction of the runway, the General Contractors Association of Hawaii, two residents of Kalihi-Palama, and the Kalihi-Palama Community Council representing other residents of the affected area.

The operative statutes are the National Environmental Policy Act (NEPA), especially § 102(2)(C),[2] and the Airport and Airway Development Act (ADAP), especially § 16.[3]

The defendants appear to have complied with the requirements of these statutes.

NEPA demands that all agencies of the Federal Government

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

[2] 42 U.S.C. § 4332(2)(C).

[3] 49 U.S.C. § 1716.

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[4]

A detailed statement called a Final Environmental Impact Statement (EIS) was prepared. It purports to discuss the required matters.

ADAP demands that the Secretary of Transportation shall consult with the Secretaries of the Interior and Health, Education and Welfare, regarding environmental effects, and shall not authorize an airport project

> "found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and pru-

[4]Portion of 42 U.S.C. § 4332(2)(C). There are other provisions of 42 U.S.C. § 4332 which are pertinent and have been considered. For example, plaintiffs pointed to the requirement that copies of the EIS and of the comments and views of the appropriate federal, state, and local agencies "shall accompany the proposal through the existing agency review process" and argued that this was not done. The evidence showed that this was done.

dent alternative exists and that all possible steps have been taken to minimize such adverse effect."[5]

The Secretary of Transportation obtained comments from the other two referenced departments and made the necessary finding.

[1] Case law makes it clear, nevertheless, that a NEPA statement may be inadequate even though it contains material covering the statutory subjects of inquiry, and that the administrative process may be improper even though it includes the use of such a statement.[6]

So it is necessary to consider the several questions raised by plaintiffs as to the adequacy of the EIS as measured by the standards developed by these cases.[7]

In doing so, I consider the statements in the EIS to be augmented by the attachments thereto and the references listed therein.[8] I also make distinctions

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[5]Portion of 49 U.S.C. § 1716(c)(4). Other requirements of ADAP are mentioned below.

[6]Administrative Procedure Act, 5 U.S.C. § 706(2); Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971); Lathan v. Volpe, 350 F.Supp. 262 (W.D. Wash. 1972); Brooks v. Volpe, 350 F.Supp. 269 (W.D. Wash. 1972).

[7]Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); Environmental Defense Fund, Inc. v. United States Army Corps of Engineers, 470 F.2d 289 (8th Cir. 1972).

[8]There are 24 documents, including the required comments by concerned federal agencies, among the references to the EIS. Many of these references ran well over 100 pages in length. The references were made available to interested mmbers of the public including plaintiffs, along with the EIS itself, before the public hearings which were held in connection with the project.

among these cases based upon the character of the project.[9]

I have made these measurements. I find that the discussion set forth in the EIS complies with the requirements of NEPA, or that in those instances where additional discussion or disclosure should be set forth in the EIS the only delinquency is in draftsmanship and not in any failure to consider the deleted matter as if it had been set forth in full in the EIS, or that the question raised by plaintiffs is one to which the EIS need not address itself.[10] Without attempting an exhaustive discussion of each of the matters as to which plaintiffs argue that the EIS is deficient, I shall illustrate the three categories mentioned.

Plaintiffs question the treatment in the EIS of the problem of noise pollution. But the EIS does discuss and graph the noise situation in some detail. The kinds of studies suggested by plaintiffs may be useful

---

[9]For example, an adequate EIS in connection with the establishment of a new airport might well differ quantitatively and qualitatively from an adequate EIS in connection with the expansion of an existing airport.

"On March 22, 1971, a public hearing was held . . . At the hearing, the State of Hawaii . . . presented evidence that the Reef Runway would:

. Reduce noise over Honolulu
. Reduce overflights over Honolulu
. Increase airfield capacity
. Provide an alternate runway during periods when the existing principal runway is under repair"

EIS page 8.

[10]See Committee for Nuclear Responsibility v. Seaborg, 3 ERC 1126 (D.C.Cir. October 5, 1971); Conservation Council v. Froehlke, 340 F.Supp. 222 (M.D.N.C. 1972), aff'd 4 ERC 1044 (4th Cir. May 2, 1972); Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9 Cir. 1973).

but are hardly necessary. They suggest a degree of certainty to which the situation does not lend itself.

Plaintiffs question the treatment in the EIS of air pollution. But building the runway does not permit air pollution beyond limits set by other laws which control air quality. The EIS does treat of the visual aspects of air pollution, and the evidence adduced indicates that nobody considered other aspects of air pollution to be an important problem until this action was filed, and that the government agencies charged with policing air quality felt that there would be no significant problem in this area. Perhaps the EIS should set forth in more detail the reasoning leading to this conclusion. But it cannot be said that air pollution was not considered by the decision makers.

[2, 3] Plaintiffs question the omission from the EIS of any discussion of the demographic impact of the traffic facilitated by the runway. Undoubtedly an EIS should discuss all of the significant primary environmental effects, and all of the substantial secondary environmental effects, of a project. How far beyond these effects an EIS should go may still be an open question, but there must be some limit. A "rule of reason" was suggested in argument.[11] In my opinion, requiring the kinds of demographic discussion suggested by plaintiffs is unreasonable in the context of this project.

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[11]See Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972); Committee for Nuclear Responsibility v. Seaborg, *supra* n. 10; EDF v. United States Army Corps of Engineers, *supra* n. 7.

The discussion in the EIS of alternatives needs separate consideration. Case law places special emphasis on this NEPA requirement and especially on the inclusion of abandonment of the project as an alternative.[12] The EIS here is very sketchy in this area. Yet it does appear from the evidence that the responsible officials in the decision making process and in the review processes did in fact consider many alternatives, including nonconstruction alternatives. I am persuaded that Mr. Thompson is right when he argues that a detailed discussion of national programs to reduce noise pollution and to improve operational efficiency should not have to be repeated in every EIS for every airport project. On the other hand, these statements are designed as much to alert and inform the public as to perform the function of the devil's advocate for the decision makers.[13] What is obvious and platitudinous to those who live with a program daily for several years is new and fearful to one who is confronted with the same program for the first time. While the EIS here may be minimally in technical compliance with statutory requirements, it leaves much to be desired as an example of the art of communication.

Mention should be made here of the extensive consideration of this project over a period of some 10

[12]Natural Resources Defense Council, Inc. v. Morton, *supra* n. 11.

[13]The cases emphasize the functions of the EIS in (1) providing evidence that the decision-making process required by NEPA was in fact followed, and (2) giving the decision makers who are removed from the initial proposal sufficient data from which to make their own determination of costs and benefits. See Brooks v. Volpe, *supra* n. 6.

years. Planning did not begin with NEPA, and while some of the present vocabulary is new, the concerns to which planners addressed themselves are not. A special task force on the airport development, involving responsible local, state and federal officials and members of the public, met about once a month for some 4 years, and wound up recommending the reef runway. The secretary of that committee testified to the many matters discussed. Because of the input from this committee's members and from other sources, the original plan was in fact materially altered, as, for example, by the change from a straight sea wall to an S-curve sea wall.

Again, it should be noted that many of the effects feared by plaintiffs can be alleviated or prevented, if they eventuate, even if construction as planned proceeds to completion.

Other questions were raised with respect to compliance with NEPA and ADAP requirements.

[4] I ruled previously that NEPA does not prevent the employment of a private contractor who has a financial stake in the project to draft an EIS. NEPA does require that the final EIS be sufficiently reviewed and considered by the "responsible official" to insure that it was a part of the decision making process.[14] Here the evidence shows that FAA officials did in fact work together with state officials and a

[14]EDF v. U. S. Army Corps of Engineers, *supra* n. 7; Greene County Planning Board v. Federal Power Com'n, 455 F.2d 412 (2d Cir. 1972); Upper Pecos Association v. Stans, 452 F.2d 1233 (10th Cir. 1971).

private contractor in the preparation of the EIS and gave it close attention.[15]

The absence of a national airport development system plan is proposed as a basis for prohibiting this development.[16] The evidence is that there is such a plan although it has not yet been published.

The certificate of the governor[17] and the finding of the Secretary of Transportation[18] are said to be unsupported. Assuming without deciding that these executive actions are subject to judicial review, there is ample support in the record for the proposition that they are deliberate conclusions based upon ample information.

[5] Under all of the circumstances and upon the evidence adduced it is my opinion that it is improbable that plaintiffs will prevail upon the merits of their complaint. Therefore, a preliminary injunction

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[15]Plaintiffs assert that the "comments and views of the appropriate Federal, State, and local agencies" did not "accompany the proposal through the existing agency review processes" as required by 42 U.S.C. § 4332(2)(C). The short answer to this assertion is that they did.

[16]49 U.S.C. § 1716(a): ". . . No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary under this subchapter . . ."

[17]49 U.S.C. § 1716(e)(1): "The Secretary shall not approve any project application for a project involving airport location, a major runway extension, or runway location unless the Governor of the State in which such project may be located certifies in writing to the Secretary that there is reasonable assurance that the project will be located, designed, constructed, and operated so as to comply with applicable air and water quality standards. . . ."

[18]49 U.S.C. § 1716(e)(4). See quote referenced to n. 3 *supra*.

will be denied.[19] The temporary restraining order is lifted.

[6] I will entertain requests for additional findings of fact and conclusions of law.[20]

---

[19]The matter came on before me for hearing on a permanent injunction on March 29, 1973. No further substantial evidence was adduced, and the matter was submitted on the record made at the hearing on a preliminary injunction with some additional offerings. I reaffirmed my earlier decision, denied a permanent injunction, and denied the request for a stay pending appeal. (There were some changes in parties between December 22, 1972, and March 29, 1973. Following the December 22, 1972, decision, bids were opened, and a contract was awarded. The unsuccessful bidders withdrew as defendants-intervenors herein. There was earlier a passing suggestion that there might be a standing issue, but inasmuch as at least one plaintiff had standing the issue was not pursued. I was prepared to hold that all plaintiffs had standing. Plaintiffs had sought to prevent intervention by the defendants-intervenors, but I earlier ruled against them and allowed the intervention.)

[20]Defendants-intervenors sought to avoid plaintiffs' challenge by charging them with laches, citing Clark v. Volpe, 342 F.Supp. 1324 (E.D.La.1972), aff'd 461 F.2d 1266 (5th Cir. 1972). The appellate court cited Ragland v. Mueller, 460 F.2d 1196 (5th Cir. 1972), which held that it was unreasonable to apply NEPA retroactively to a road project when 16 of 20 miles had already been fully completed and the right-of-way for the remaining 4 miles had already been acquired. I ruled previously that plaintiffs were not barred by laches. There was no showing that plaintiffs' timing constituted unreasonable delay. Rather, the evidence showed that plaintiffs used the period between approval of the EIS on February 29, 1972, and the filing of this action on November 8, 1972, to pursue available administrative remedies. The court may even decline to invoked laches in environmental cases "because of the public interest status accorded ecology preservation by the Congress." Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1329 (4th Cir. 1972). See Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F.Supp. 238, 246 (M.D.Pa.1970), aff'd 454 F.2d 613 (3rd Cir. 1971); Harrisburg Coalition Against Ruining the Environment v. Volpe, 330 F.Supp. 918, 924 (M.D.Pa.1971); Nolop v. Volpe, 333 F.Supp. 1364 (D.S.D. 1971); Natural Resources Defense Council v. Grant, 341 F.Supp. 356 (E.D.N.C. 1972).

Appendix D

In the United States District Court
for the District of Hawaii

Civil No. 72-3683

Life of the Land et al., Plaintiffs,

vs.

John Volpe, Individually and in his capacity as Secretary of the United States Department of Transportation, et al., Defendants,

and

Kalihi-Palama Community Council et al., Defendants-Intervenors.

FINAL DECISION AND ORDER

This matter having come on regularly for hearing on the merits on March 29, 1973, and the Court being fully advised in the premises, now therefore, for the reasons set forth in this Court's Decision and Order herein dated December 22, 1972,

It Is Hereby Ordered that the request of the plaintiffs for a permanent injunction be and the same hereby is, DENIED.

It Is Further Ordered that the plaintiffs' request for an injunction pending appeal, made pursuant to Rule 62(c), Federal Rules of Civil Procedure, and

Rule 8(a), Federal Rules of Appellate Procedure, be, and the same hereby is, DENIED.

Dated: This 12th day of April 1973 at Honolulu, Hawaii.

Samuel P. King,
Judge of the above-entitled
Court.

Appendix E

STATUTORY PROVISIONS INVOLVED

A. National Environmental Policy Act of 1969:

United States Code, Title 42:

§ **4321. Purpose.**—The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

§ 4331. Congressional declaration of policy.—(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

. . .

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; . . .

§ **4332. Administration consistent with policies of Act.**—The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

. . .

B. Airport and Airways Development Act of 1970:

United States Code, Title 49:

§ **1716. Submission and approval of projects for airport development.—(a) Submission.**— . . . [A]ny public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. . . .

. . .

(c) Approval.—(1) All airport development projects shall be subject to the approval of the Secretary, . . .

. . .

(4) It is declared to be national policy that airport development projects authorized pursuant to this part shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretaries of the Interior and Health, Education, and Welfare with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect.

. . .

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No. 73-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

LIFE OF THE LAND, ET AL., *Petitioners*,

v.

CLAUDE S. BRINEGAR, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

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---

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

The academically ambitious questions tendered by the petition simply do not arise from the record here. At best, the record and the petitioners' surviving contentions could be said to raise such questions as:

1. Whether environmental groups and allegedly interested individuals are entitled to any manner of judicial relief, much less drastic halt by injunc-

tion of an important federally supported airport project, upon naked allegation and argument that an environmental impact statement (EIS) promulgated by the Secretary of Transportation pursuant to § 102(2)(C) of the National Environmental Policy Act,[1] and corresponding findings under § 16(c)(4) of the Airport and Airways Development Act,[2] were inadequate for failure to discuss at sufficient length, or at all, certain "alternatives" to the project suggested by petitioners, and because a financially interested private contractor may have participated in the preparation of the EIS—in the absence of proof that the "alternatives" so suggested by petitioners were in any way reasonable or feasible or that the Secretary had in fact abdicated any significant part of his responsibility to a private contractor, or any one else, and /or in the face of adverse findings of fact by a district court, concurred in by the court of appeals, not shown to be "clearly erroneous" within the meaning of Rule 52(a), Federal Rules of Civil Procedure; and

2. Whether in any event the district court and /or the court of appeals, in the light of the facts and circumstances here, could be said to have abused their discretion in having weighed the interests of large numbers of Honolulu residents in prompt relief from noise pollution and danger of disastrous aircraft accident in their midst, found by

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[1] 42 U.S.C. § 4332(2)(C), Pub. L. 91-190, Title I, § 102(2)(C, 83 Stat. 853, effective January 1, 1970, hereinafter "NEPA."

[2] 49 U.S.C. § 1716(c)(4), Pub. L. 91-258, Title I, § 16(c)(4), 84 Stat. 226, effective May 21, 1970, hereinafter "AADA."

> the courts below upon an ample record to be among the purposes and reasonably predictable results of the project, against the demands of petitioners for additional study and more meticulous formal compliance with NEPA; having struck the balance in favor of the former; and having accordingly denied injunctive relief, the only form of judgment which petitioners seek or, apparently, are willing to accept;

neither of which questions involve important features of Federal law, or for that matter any plausibly debatable proposition of Anglo-American legal understanding, requiring resolution by this Court.

STATEMENT OF THE CASE

Involved here is an additional aircraft runway, construction of which is well underway,[3] being adjoined to the Honolulu International Airport, some 6,700 feet south and seaward from the existing principal runway at that facility, which is unhappily located in the midst of urban Honolulu. The project is the net upshot of some 10 years' concern, investigation and planning by various citizens' groups in Hawaii, the executive, legislative and administrative branches of government in that State, and appropriate federal agencies,[4] aimed at relief of nearby residential areas and downtown Honolulu from aircraft noise pollution and danger of dis-

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[3] See Motion to Vacate Order Staying Mandate, filed by the State respondent in No. A-435 on November 13, 1973, p. 4. These answering respondents are informed and believe that fill work has proceeded apace since that date at the rate of two acres per day.

[4] See court of appeals opinion, 485 F.2d at 464-65, App. A of Petition, pp. 6-8.

astrous aircraft accident.[5] Apart from relieving these conditions of prime concern,[6] the project was seen as likely to produce various other environmental side benefits as well.[7]

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[5] Under present conditions noise pollution is so bad as to interfere with instruction in schools, Ex. D-1, p. 8, not to mention proceedings in courts, including particularly the proceedings of the district court here. See, *e.g.*, Transcript, Vol. I, p. 381, Vol. II, pp. 473, 575, 765:

> "MR. HART: Excuse me, I can't hear. There's an airplane.
> "(Airplane flying over)."
> "Q. . . . Would you explain—
> "(Airplane flying over)
> "THE COURT: We're going to have a noise station in the courthouse.
> "THE WITNESS: That wouldn't be there with the Reef Runway."

As to crash dangers, the court of appeals observed, with ample record support (Transcript, Vol. II, p. 709), that

> ". . . There is evidence that jet aircraft mishaps most often occur within forty seconds after take-off, or about 1.6 miles from the end of the runway. In the case of HIA's present configuration, this would place the aircraft in the midst of the Kalihi-Palama residential neighborhood." (485 F.2d at 464, App. A of Petition, p. 6).

There was also evidence that 30 seconds after take-off, planes are over a school complex in the Kalihi-Palama area, Transcript, Vol. II, p. 714, and that just such a disaster was recently averted by only a matter of yards and seconds, Transcript, Vol. II, p. 711.

[6] As the court of appeals noted, "Such a runway would largely eliminate the spectre of a disastrous aircraft accident in a populated residential area, and would also reduce noise pollution by moving it more than a mile away." 485 F.2d at 465, App. A of Petition, p. 7.

[7] See 485 F.2d at 465, App. A of Petition, pp. 8-9:

> "There is nothing in the record indicating that the planners of the project believed, or had reason to believe, that the project would have an irreparably deleterious effect upon

Toward the tail end of planning for the project, NEPA was enacted and became effective. Because federal financial assistance under AADA was involved, the project became a "major Federal action significantly affecting the quality of the human environment" within the meaning of § 102(2)(C) of NEPA, and an EIS was prepared and promulgated accordingly. The court of appeals observed, and it is not disputed, that "there is ample evidence in the record indicating that [the planners] have acted in a good faith attempt to comply with both the spirit and letter of NEPA,"[8] albeit that the EIS in question is admittedly something less than a literary masterpiece.[9]

Be that as it may, the petitioners, not content with their markedly effective participation in the preceding planning and hearing phases of the project,[10] filed ac-

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the environment. On the contrary, the possibility of various environmental side benefits, such as reduction of air and water pollution, enhancement of recreational boating facilities and improvement in area fishing . . . were all hopefully anticipated."

[8] 485 F.2d at 466, n. 7, App. A of Petition, p. 11.

[9] The district court observed, and these respondents have no hesitancy in agreeing, that there may have been some "delinquency . . . in draftsmanship" of the EIS, and that "it leaves much to be desired as an example of the art of communication." 363 F.Supp. at 1174, 1175, App. C of Petition, pp. 37, 39.

[10] At least two of the petitioners expressed concern during the planning stages of the project about the effect of the same upon a habitat of some 100 Hawaiian Stilts, a relatively rare species of bird. They did not on that account, or otherwise, oppose the project as such but urged only that some replacement habitat be provided for the birds. The planners were more than sensitive to this problem. Unchallenged by the Petition is the observation of the court of appeals that:

"The record indicates that the plight of the Stilts has continuously been a matter of concern to the planners of the

tion in the District Court for the District of Hawaii on the eve of the opening of bids for construction, praying halt by injunction on account of alleged departures from the requirements of NEPA and AADA.[11] In the vividly dramatic terms which have come to characterize environmental litigation, the complaint alleged all manner of environmental horrors as likely to be visited on the biosphere by the project, including "impact of increased tourism in Hawaii," "effect on the endangered Hawaiian Stilt," destruction of "surfing and recreational areas in the vicinity," injury to the "marine environment," increase of "noise levels in the vicinity," "harm to wildlife and bird roosting and resting areas, harm to valuable fishing sites, destruction of water recreation facilities, loss of the effective use of the proposed Sand Island Park due to high aircraft noise over the area from the proposed runway, loss of reef area for marine mollusks, loss of surfing sites, loss of tuna bait grounds, and loss of at least 765 acres of marine wildlife habitat area." It was also alleged that the EIS "fails completely to discuss some reasonable and feasible alternatives" and "treats other alternatives in insufficient detail," and that in any event the whole business was illegal "because the preparation of the Final Impact Statement was improperly delegated by the Federal Defendants to the State Defendants, and by the State Defendants to the RALPH M. PARSONS CO., INC." Suitably impressed by these

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project. As recommended by appellants, the replacement habitats at nearby Pearl Harbor Naval Station are being developed in conjunction with the project. Also included in the project itself is the construction of certain ponds and islets suitable for the birds at a cost in excess of $350,000." (485 F.2d at 473, App. A of Petition, p. 28).

[11] Complaint, filed November 8, 1972.

allegations, the district court entered a temporary restraining order. There followed a hearing on petitioners' motion for preliminary injunctive relief, which occupied some seven days' trial time, and occasioned consideration of an uncounted several thousand pages of documentary material, not to mention some 898 recorded pages of testimony, much of which was received by the district court over objection.[12]

Following such extended hearing, the district court denied the motion for preliminary injunction and lifted the temporary restraining order.[13] Some months later, petitioners availed themselves of opportunity for trial on the merits of their prayer for permanent injunction, at which time, however, they adduced no further substantial evidence but submitted on the record made upon the earlier motion for preliminary injunctive relief.[14] The district court denied the prayer for permanent injunction, and a motion for injunction pending appeal.[15] Appeal to the United

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[12] For example, the better part of an afternoon and morning were consumed by the district court's entertainment, over objection, of what can only be described as an unseemly lecture by a law professor in the University of Michigan, said to specialize in teaching and writing about "environmental" law, concerning what NEPA means and how it should be applied, in which connection a ream or more of paper was received as illustrative of what a "really good" EIS should look like. Transcript, Vol. I, pp. 397-425, Vol. II, pp. 426-447.

[13] Decision and Order of December 22, 1972, 363 F.Supp. 1171, App. C. of Petition, pp. 33 *et seq.*

[14] See Transcript of Proceedings, March 29, 1973, pp. 2-3, 363 F.Supp. at 1176, n. 19, App. C of Petition, p. 42.

[15] Final Decision and Order of April 12, 1973, App. D of Petition, pp. 43-44.

States Court of Appeals for the Ninth Circuit followed, during the pendency of which that court entered an injunction.[16] In due course the court of appeals affirmed the district court, and dissolved the injunction pending appeal.[17]

Some months later still, petitioners, after having unsuccessfully applied to the court of appeals for rehearing and or injunction pending petition for certiorari in this Court, obtained from Mr. Justice Douglas, as Circuit Justice for the Ninth Circuit, an *ex parte* order staying the mandate of the court of appeals and reinstating injunction *pendente lite* pending receipt of memoranda in opposition, which stay and injunction was re-affirmed some five days later.[18] Two weeks later, the full Court granted motions to vacate the stay and injunction entered by Mr. Justice Douglas.[19] The present petition followed.

At this juncture, the case is justiciably troublesome only in the difficulty it presents in discerning precisely what petitioners' essential grievance is, and in wading through petitioners' manifest inability or unwillingness to appreciate that allegation is not evidence and that evidence is not necessarily proof.

If the original complaint of November 8, 1972 reflected afterthoughts which had not occurred to peti-

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[16] 485 F.2d at 463, App. A of Petition, p. 4.

[17] 485 F.2d at 474, App. A of Petition, p. 30.

[18] *Ex parte* order in No. A-435 was entered on November 2, 1973. The order re-affirming the same after consideration of memoranda in opposition was entered on November 7, 1973.

[19] Life of the Land v. Brinegar, No. A-435, November 21, 1973, —— U.S. ——, 38 L.Ed. 2d 341.

tioners during the preceding 10 years' planning,[20] the extended hearings in December 1972 inspired them to still further afterthoughts which had not occurred to them at the time of pleading, namely, expressions of vague concern about air and water quality, and suggestions that there may have been some irregularity in the publication and dissemination of the EIS.

For the most part, however, the petitioners did not see fit to support their several claims, however and whenever raised, by any manner of evidence, much less proof satisfactory to the trier of fact. For example, no evidence whatever was offered even remotely supporting claims of prejudicial harm to anyone as a result of alleged irregularities in the publication and dissemination of the EIS,[21] or of allegations of injury

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[20] Over a period of four years from 1967 through April 1970, some 46 or 47 public meetings of a citizens' Task Force Committee concerning noise pollution and crash dangers in Honolulu were held. 485 F.2d at 464-65, App. A of Petition, p. 7. When the enactment of NEPA intervened in the planning process, a draft EIS was distributed to, and comments invited from, some 80 federal, state and local agencies, private groups and interested individuals (Ex. D-1, pp. i-x), including at least two of the present petitioners and one of their expert witnesses, namely, Life of the Land, Hawaii Audubon Society and one Dr. Karl Bathen (Ex. D-1, pp. ii, v, and see Transcript, p. 311). Another plaintiff below, Sierra Club, was also furnished with a draft EIS and invited to comment (Ex. D-1, p. iv). Sierra Club, however, has apparently seen fit to accept the decision of the court of appeals and to forego participation in the present petition. See letter of January 3, 1973, from petitioners' counsel to the Clerk. While not required by NEPA, a formal public hearing was held on March 22, 1971. 485 F.2d at 464, App. A of Petition, p. 8. There is no record of any of the petitioners' having expressed concern for anything other than the habitat of the Hawaiian Stilt. See 485 F.2d at 465, 473, App. A of Petition, pp. 8, 28.

[21] Notwithstanding the absence of any proof on the subject, petitioners pursued claim on this account to the court of appeals,

to the "marine environment, . . . harm to valuable fishing sites, destruction of water recreation facilities, . . . loss of reef area for marine mollusks, . . . loss of tuna bait grounds," and there remains unchallenged the anticipation reported in the EIS of "an enhancement of recreational boating facilities and an improvement in fishing conditions as a result of improvement in the water quality of Keehi Lagoon, . . . and the construction of channels to the open sea."[22] Similarly unpursued by proof were dire allegations concerning noise and air pollution by the project. Such evidence as there was on the subjects seemed calculated to suggest, at best (and apart from their complaint petitioners never claimed more), not that the project would increase these forms of pollution, but that additional studies might conceivably have shown that the extent of reduction of the same might not be as great as anticipated.[23] Petitioners' "evidence" in support of allegations concerning such matters as demographic effects of the project, water quality, recreational surfing and wildlife, was so manifestly attenuated and lacking in probative worth as to have led the courts below to find the same unsatisfactory.

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which noted that "appellants had ready access to these documents, and did in fact avail themselves of them," and described petitioners' contentions in this regard as "an attempt to place form over substance." 485 F.2d at 468, App. A of Petition, pp. 16-17.

[22] 485 F.2d at 473, App. A of Petition, p. 26. Apart from the fact that there is no evidence that a biologically valuable "estuary" is involved here, the record does not justify Mr. Justice Douglas' expressions of concern in No. A-435 that "estuaries are essential in part of the life cycle of two-thirds of the marine life," and that 'dredging makes these estuaries biological deserts for years to come." ——U.S. at ——, 38 L.Ed.2d at 343.

[23] 485 F.2d at 470, 472, App. A of Petition, pp. 20-21, 24-25.

Demographic fault-finding took the form of extended testimony by a sociologist to the effect that as human populations increase "some very bad things" begin to happen,[24] a proposition to which respondents unsuccessfully offered to stipulate.[25] The witness syllogized that since the EIS indicates that non-construction of the project would, among other things, "limit the growth of the tourist industry, one of Hawaii's largest industries,"[26] it might be logically posited that building it would tend to *increase* tourism, which in turn would tend to increase the permanent population of Hawaii, and engender the evil effects upon which the witness discoursed.[27] The witness' expert suggestion was that population growth should be stopped or retarded, and decision to go forward or not with the project deferred, for a period of some 10-15 years pending study and reflection upon "what size of population we want."[28] The court of appeals appraised this "evidence" as follows:

> "We reject this reasoning. That an increase in Honolulu's tourism will result in an increase in that city's permanent population is speculative. Certainly there is no empirical data in the record supportive of the allegation. We agree with the district court's conclusion that 'requiring the kinds of demographic discussion suggested by [appellants] is unreasonable in the context of this project.'"[29]

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[24] Transcript, pp. 15-82.

[25] *Id.* at p. 19.

[26] Ex. D-1, p. 35.

[27] Transcript, pp. 38-40, 46-47.

[28] *Id.* at pp. 72, 77-79.

[29] 485 F.2d at 549, App. A of Petition, p. 19. See also 363 F.Supp. at 1174-75, App. C of Petition, p. 38.

On the subject of water quality, petitioners, through an expert witness called for that purpose, complained that one of the several hydraulic studies referred to in the EIS might be read as being at odds with the EIS' conclusion that the project would *improve* water quality in the area.[30] The same witness acknowledged, however, that the particular study in question had been addressed to an earlier proposed configuration of certain seawalls, which configuration was thereafter changed for the very purpose of correcting the problems to which petitioners obliquely alluded,[31] and that a subsequent study based on the new configuration, prepared by experts whose qualifications the witness endorsed,[32] *was* supportive of the EIS conclusion that the project would improve water quality.[33] Petitioners, nevertheless, nakedly argued below that the latter "is a very brief study of an extremely complicated problem which was done on rather short notice and it has some deficiencies,"[34] supported by "evidence" in the form of a series of letters from some University of Hawaii professors, who were not made available for cross-examination, commenting adversely upon the relative professional excellence of the study.[35] The courts below were unpersuaded that there was any factual basis for finding that the Secretary had unreason-

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[30] Transcript, pp. 314-20. See Ex. D-1, pp. 18, 45, and Ex. D-18.

[31] Transcript, pp. 320, 323.

[32] Ex. D-6, Transcript, pp. 316, 318, 324-25.

[33] Transcript, p. 325.

[34] Id. at p. 346.

[35] Exhibits P-28, P-29, P-30, P-31, P-32 and P-39. See Transcript, pp. 869-70.

ably concluded that the project would have no significantly adverse effect upon water quality.[36]

Attempted proof by petitioners of allegations of "loss of surfing sites" took the form of testimony by a lay, so-called "out-reach" worker, who reported hearsay speculations by several disadvantaged youths with whom he works to the effect that the project might produce "some kind of current . . . that are not well liked by surfers" at a surfing spot favored by the youngsters some two miles away from the project, and might even attract sharks.[37] The youngsters said to have expressed these thoughts were not made available for cross-examination, and the factual basis, if any, for their rather colorful speculations cannot be ascertained from the record. The court of appeals noted that "the district court was understandably unpersuaded by this hearsay testimony." [38]

As noted by the court of appeals, "the *only* clearly documented adverse environmental effect of the project which could be said to be significant" [39] is that disclosed and discussed at length in the EIS itself, namely, displacement of some 186 acres of silted coral mudflats used for feeding and roosting by birds, including some 20-100 individuals of the relatively rare Hawaiian Stilt species.[40] The extraordinary extent to which those

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[36] 485 F.2d at 472-73, App. A of Petition, pp. 25-26.

[37] Transcript, pp. 84-119.

[38] 485 F.2d at 473, App. A of Petition, p. 27.

[39] 485 F.2d at 473, App. A of Petition, p. 27. (Emphasis added).

[40] Ex. D-1, p. 26; Ex. D-44.

responsible for the project went to minimize harm to and accomodate the birds is undisputed:

> "The record indicates that the plight of the Stilts has continuously been a matter of concern to the planners of the project. As recommended by appellants, the replacement habitats at nearby Pearl Harbor Naval Station are being developed in conjunction with the project. Also included in the project itself is the construction of certain ponds and islets suitable for the birds at a cost in excess of $350,000." [41]

Petitioners offered no evidence that the effect of the project on wildlife was different or worse than as reported in the EIS or that such minimal harm as was acknowledged was unavoidably irreparable. Indeed, petitioners offered no evidence on the subject at all, save the testimony of a recently elected lay officer of the Hawaii Audubon Society,[42] who disclaimed any professional expertise enabling him to give an opinion about birds and their habitats,[43] and whose sole apparent office was to mouth from the witness stand the "position" of the Hawaii Audubon Society concerning the project:

> "Q. (By Mr. Sherwood) Let me ask you this, Mr. Mull, are you or is the Hawaii Audubon Society necessarily opposed to the building of the Reef Runway?
> "A. Well, we have taken no position in opposition to the Reef Runway.
> "Q. Why are you a plaintiff in this lawsuit?
> "A. I beg your pardon?

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[41] 485 F.2d at 473, App. A of Petition, p. 28.

[42] Transcript, pp. 272-89.

[43] *Id.* at p. 273.

> "Q. Why are you a plaintiff in this lawsuit? What is the concern of the Hawaii Audubon Society?
>
> "A. The concern is that the impact statement reflects a situation in terms of current knowledge with respect to wildlife and wildlife replacement areas as accurately as possible and that the—that if replacement is a prospect that that replacement be indeed adequate, as is stated in the impact statement, basically, we question the adequacy of the proposal for replacement habitat. . . ." [44]

Becoming understandably impatient with petitioners' extended presentation of obviously irrelevant "evidence" (all of which it nevertheless entertained), the district court was provoked to observe in the context of this witness' testimony that, "Somewhere along the line I imagine we're going to get to the legal issues." [45] The court of appeals, generously crediting this "evidence" at face value, no less understandably saw it as falling short of demonstrating *irreparable* environmental harm:

> "The main contention of appellants here is that the size of the replacement habitats may prove to be inadequate. But the district court noted, and we concur, that if the size of the habitats do indeed prove to be inadequate, there is no reason why

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[44] *Id.* at 285-86. See also Transcript, pp. 275-76, where the witness confirmed that the "position" of the Hawaii Audubon Society remained as given in writing in 1971 during the planning stages of the project, as follows: "The Hawaii Audubon Society strongly recommends that planning for the runway include provision that shallow feeding areas at least equal in area to those destroyed be created . . ., a constructed area of twice the size of that destroyed would be more desirable."

[45] Transcript, p. 284

adjustments could not be made even if the construction as planned proceeds to completion." [46]

Notwithstanding that petitioners had thus failed in threshold demonstration of fact that any relevant feature of the environment, much less themselves, had suffered or would suffer any irreparable harm as a result of the project, the courts below accorded them standing to grumble further.[47] It is this further grumbling only which is the subject of the present petition, petitioners having evidently abandoned allegations concerning such things as purported irregularities in the publication and dissemination of the EIS, and injury to fishing, recreational facilities, population levels, air and water quality, wildlife, etc.[48]

Record support for such surviving contentions as petitioners would have this Court consider, namely, that the Secretary had improperly delegated his responsibilities under NEPA to a financially interested private contractor, and that alternatives to the project were not properly considered, is likewise meagre, obscure or non-existent.

For example, petitioners' statement that they "were precluded by the trial court from developing the relative degrees of participation by Parsons, the state agency, and the federal agency, although Petitioners'

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[46] 485 F.2d at 473, App. A of Petition, p. 28.

[47] See 363 F.Supp. at 1176, n. 19, App. C of Petition, p. 42; 485 F.2d at 463, n. 2, App. A of Petition, p. 3.

[48] Purported grievances on these subjects were pursued by "voluminous briefs" to the court of appeals, and there rejected on factual grounds. 485 F.2d at 468-70, 472-73, App. A of Petition, pp. 15-21, 24-28. The petition may be searched in vain for any suggestion of error in these regards.

counsel made ample offers of proof on this issue," and that the court of appeals upheld a ruling by the district court "*as a matter of law* that the preparation of an EIS may be delegated to a private party with a major financial interest in the proposed project," [49] is purely and simply, and nothing more nor less, than a bald and bold misstatement of the record. In the first place, the district court at no time ruled as a matter of law or otherwise that responsibility for an EIS might be delegated to an interested private party, having ruled only that in and of itself there is nothing wrong as a matter of law in having an interested person participate in the drafting of an EIS; and secondly, far from being precluded from pursuing the subject, petitioners were expressly granted leave by the district court to offer such proof as they were disposed to present:

> "THE COURT: I already ruled that there was nothing wrong with having somebody with a financial interest in the project assist in drafting the impact statement.
>
> "MR. HART: Okay. I've heard the Court's ruling. I, of course, accept it, but I would like to make a record on it.
>
> "THE COURT: Yes, and I'm allowing you to do so." [50]

Petitioners' counsel plainly understood "that it was more than merely making an offer of proof . . . the Court would permit. It was a factual record. . . ." [51]

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[49] Petition, p. 10. (Emphasis in original).

[50] Transcript, p. 359.

[51] *Id.* at p. 358.

Their offer was as follows:

> ". . . If the public agency actively participates in the preparation of the environmental impact statement, the law may be complied with. If it does nothing more than comment on a final product of a contracted out private consulting agency, the law may not be complied with and that's my offer of proof." [52]

In pursuit of this offer, petitioners subpoenaed an employee of the consultant in question and examined him at some length concerning his contribution to the preparation of the EIS. [53] The witness testified that pursuant to contract with the State he had prepared a first draft of a preliminary EIS, [54] working in that connection from guidelines furnished by the Federal Aviation Agency (FAA); [55] thereafter portions were extensively revised at the direction of the State or the FAA, to which end a number of meetings were held; [56] there were numerous drafts, the witness having "lost count after about nine or ten," [57] some portions of which were re-written directly by the FAA, and others by the State, such that authorship of any given page is now beyond identification. [58] The district court was led by this testimony to satisfaction that "my understanding of his role was that he was an editor." [59]

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[52] *Id.* at p. 366.

[53] *Id.* at pp. 296-303, 350-89.

[54] *Id.* at pp. 298, 351.

[55] *Id.* at pp. 345-55.

[56] Transcript, pp. 298-99, 351, 353.

[57] *Id.* at p. 360.

[58] *Id.* at pp. 298-99.

[59] *Id.* at p. 376.

It was only after petitioners' counsel had become manifestly dissatisfied with the information which examination of the witness was producing, and had descended to plainly petty unproductive quibbling about minute details, that the district court, in the interests of keeping the inquiry within some reasonable bounds, imposed any manner of limitation on petitioners' offer of "proof" on this subject. On the heels of inquiry of the witness concerning the location of the numerous draft pages of the EIS which had been revised, the district court understandably observed that "I really don't see where you are going,"[60] and finally ruled that:

> "THE COURT: . . . I'll sustain the objection to any further examination of this detailed character of what Mr. Dittmar did and what piece of paper he got first, who he saw first, what telephone calls he made, how many drafts he typed up or who typed them, where he took them, et cetera.
>
> "MR. HART: Those kinds of questions, Your Honor, were only preliminary to the substance how—
>
> "THE COURT: Well, they were taking an awful long time . . . . I'm ruling that it's of no interest who actually pushed the pen and who actually described the English words or anything—
>
> "MR. HART: Sure, okay.
>
> "THE COURT: —who used the dictionary."[61]

Petitioners' counsel acknowledged with commendable candor that he had no "hard evidence" to present in support of the notion of the complaint that there had

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[60] *Id.* at p. 360.

[61] Transcript, pp. 364-65, 367.

been some species of wrongful delegation of official responsibilities to an interested private contractor, and that what petitioners really had in mind in this regard was "to ask everybody a lot of questions to see if [they could] develop it."[62]

There was other evidence of the active participation of appropriate federal officials in the preparation of the EIS, both in Honolulu and in Washington,[63] which petitioners' "statement of the case" ignores.[64] While the federal officials who testified were cross-examined by petitioners at great length,[65] the cross-examination seems to have touched this subject only cursorily or not at all, and certainly was unproductive of any information even remotely tending to suggest that the responsible federal agency officials had merely "rubber stamped" a final product of a private consulting firm. The district court inevitably found as fact that:

> ". . . . Here the evidence shows that FAA officials did in fact work together with state officials and a private contractor in the preparation of the EIS and gave it close attention."[66]

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[62] *Id.* at p. 372.

[63] The Chief of the Environmental Staff of the Planning Division, Airport Service, FAA Headquarters in Washington, Transcript, pp. 743-73, and the Chief of the Pacific Region, Airports Division, FAA, in Honolulu, *id.* at pp. 820-37. Indeed, it appeared that the regional director of the FAA in Honolulu had been an active member of a citizens' Task Force Committee which had been publicly exploring the airport problem for some years prior to NEPA's enactment. *Id.* at p. 822. See 485 F.2d at 464-65, App. A of Petition, pp. 7-8.

[64] *Cf.* Petition, p. 10.

[65] Transcript, pp. 773-812, 837-53.

[66] 363 F.Supp. at 1175, App. C of Petition, pp. 40-41.

The court of appeals concurred in this finding, and concluded that there was no basis for suggestion that the federal agency here did " 'abdicate a significant part of its responsibility' to another organization," or that there was otherwise "any improper or illegal delegation in this case." [67]

Like the original complaint in the district court, the present petition treats of purported omission from the EIS of discussion of "alternatives" to the project in wholesale terms, without specific identification or separate analysis, or even list for that matter, of precisely what "alternatives" petitioners had or have in mind. [68] Judging from incidental references here and there in the petition, petitioners seem to persist in at least passing mention of the following from among the numerous random "Monday morning quarterback" suggestions of alternatives to the project which they made below:

> 1. "[R]equire the two commercial inter-island carriers, Hawaiian Airlines and Aloha Airlines, to commence their takeoff runs of their twin jet DC-9's and Boeing 737's, respectively, from the far western end of the existing primary jet runway, rather than from the present takeoff point, approximately 4,000 feet to the east and closer to populated areas." [69]
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> 2. "[R]emoving military and general aviation from HIA [Honolulu International Airport]." [70]

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[67] 485 F.2d at 467-68, App. A of Petition, pp. 14-15.

[68] Compare concurring and dissenting opinion of Judge MacKinnon in National Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 840 (D.C. Cir. 1972).

[69] Petition, pp. 8, 19 (n. 7), 20.

[70] *Id.* at pp. 9, 18-19 (n. 7), 20-21.

> 3. "[I]mproving air traffic control, employing aircraft with less noisy engines, retrofitting older aircraft with quieter engines, adjusting and consolidating airline schedules so as to increase the passenger load factor on individual flights, and converting the aircraft fleet to wide-body aircraft." [71]

Petitioners seem thus to have now confined their alternative suggestions to so-called "non-construction" alternatives,[72] and to have abandoned alternative *construction* ideas which they belabored below, including, for example, the notion that instead of building a new runway further away from all populated areas, the existing runway should have been extended into the adjoining Hickam Air Force facility, knocking down and relocating some $22,000,000 worth of Air Force installations on the way, and transferring noise pollution from one Honolulu neighborhood to another.[73]

The courts below were unimpressed with the factual record made by petitioners concerning the reasonableness and feasibility of the "alternatives" they claim were improperly ignored.

For example, petitioners' plea for "removing the Air Force KC-135 tanker operations from HIA to a

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[71] *Id.* at pp. 9, 19 (n. 7).

[72] See *e.g.*, Petition, pp. 3, 8.

[73] Extended study of this rejected alternative is reported in the EIS. Ex. D-1, pp. 34-35, and reference 17 thereof (*id.* at p. 45), in evidence as Ex. D-20. The court of appeals could find no justification in fact or reason for petitioners' claim that this alternative should not have been rejected. 485 F.2d at 470-71, App. A of Petition, pp. 21-22.

nearby military airport" [74] was and is supported by no evidence or even plausible argument as to where the planners might have found the spectral "nearby military airport" to which Air Force operations might have been removed. The only apparent evidential undertaking by petitioners on this subject was cross-examination of respondents' witnesses, which was notable for its lack of success. The following is illustrative:

> "Q (By Mr. Sherwood) I might say, by the way, that I agree with all what you said—the plaintiffs do, too, certainly, your concern for the safety of the people of Kalihi-Palama. If everything you've said about the KC-135 Tanker flying sometimes perhaps over gross full of volatile fuel, wouldn't a reasonable position to take be that those tankers shouldn't be using Honolulu International Airport at all? They shouldn't be flying around populated civilian areas? They shouldn't be using a civilian airport?
>
> "A I think the thing we've learned with the Reef Runway is that there are many, many factors involved and that all of these factors really have to be taken into consideration. As I understand, that's what this suit is all about. Whether that is the case or not, I don't know. I know this: That they are operating out of here and that within the realm of political and physical reality we try to come up with a solution not just for Kalihi-Palama, but for the whole community that would be the best solution under the circumstances. I can see where obviously removing airports is a better solution, but no one has come up with the billions of dollars that it would take to remove it. . . . [I]t would cost a considerable amount of money because there has been testimony in the

[74] Petition, pp. 20-21.

> past that in order to use Barbers Point they can't use the existing runways because they're pointed right into the mountains and they would have to create a whole new runway out there. They would have to relocate the underground fuel facilities plus enormous other facilities—communications, maintenance and so forth and worse than that, the Governor from the outset had stated that he wouldn't transfer the noise to another community —that we were going to have to solve this problem right where it was and I think justifiably so, you'd pollute Ewa Beach with noise to a world beyond belief if we moved the tankers to Barbers Point, so to us that's a non-solution and I think rightfully so. After all the experts testified somebody had to get on with the project that would solve the problem and that was our job." [75]

Similarly, the only evidence offered by petitioners in support of their present insistence upon "removing . . . general aviation operations from HIA altogether," [76] as an alternative to the project, was, if anything, inconsistent with that plea. An amateur weekend pilot of light, single-engine, so-called "general" aircraft, briefly testified on behalf of petitioners [77] that in his opinion:

> ". . . general aviation should be allowed freedom into and out of all public airports including large hub airports such as Honolulu, but that the degree of mixture that exists at Honolulu International is basically unhealthy. It is unique to some extent at Honolulu International from my observation to have as much military, commercial and general aviation operating simultaneously and

[75] Transcript, pp. 735-37.

[76] Petition, p. 20.

[77] Transcript, pp. 304-310.

> concurrently out of the same general airport area. I think that it's highly desirable to have some alternatives. . . .
>
> "THE COURT: But, you don't like the alternative of moving all the general aviation out of there altogether?
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> "THE WITNESS: Not as a mandatory move; no, Your Honor, I don't. I think that there is every reason to assume that general aviation should have access to Honolulu Airport, but at the moment no alternatives—workable alternatives for Honolulu general aviation exist. . . ." [78]

Having thus succeeded in disproving their claim by their own witness' testimony, petitioners hastily dropped the subject in the district court.[79] Other evidence, conveniently not mentioned in petitioners' "statement of the case," was to the effect that the problem of general aviation is essentially one apart from and collateral to the prime purposes of the project, namely, to reduce noise pollution and crash dangers from large jet aircraft; that in and of themselves small "general" aircraft are no particular problem, except insofar as they interfere with large aircraft operations and pose collision risks; and that efforts are in progress to relocate general aviation quite independently of the project,[80] the same being frustrated for the present because whenever a new location for general aviation has been proposed "environmentalists rose up with hue and cry."[81]

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[78] *Id.* at p. 309.

[79] Respondents, of course, omitted cross-examination. Transcript, p. 310.

[80] Transcript, pp. 550-56, 650-52, 737-38.

[81] *Id.* at p. 737.

Evidence in support of petitioners' suggestion that need for the project could be eliminated by the simple and expedient alternative of requiring pilots of the smaller inter-island carriers to make full use of the existing runway took the form of opinion testimony by an Hawaiian Airlines pilot to the effect that if all pilots of the smaller DC-9's and Boeing 737's used by inter-island carriers were forced to takeoff from the end of the existing runway, as the witness himself insists on doing, rather than being permitted to takeoff from about half way down, noise and safety problems arising from *these particular aircraft* could be largely reduced if not eliminated.[82] There was and is no evidence or argument as to how reduction of noise pollution and crash hazards from these smaller aircraft could in any way be thought to be an "alternative" to elimination of noise pollution and crash hazards from the larger commercial and military jet aircraft, which latter is the prime purpose of the project. Again, other evidence indicated that the problem of the takeoff point of these smaller aircraft is essentially a collateral one; that after the larger aircraft are moved to the new runway when completed, the smaller aircraft to which the witness referred will continue to use the existing runway, at its full length as the witness urged.[83] Indeed, conspicuously absent from petitioners' "statement of the case,"[84] is acknowledgment that on cross-examination their pilot

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[82] Transcript, pp. 206-237.

[83] *Id.* at pp. 640, 737-38.

[84] At Petition, p. 8, record reference is scrupulously confined to "Tr. pp. 206-19, 230-1," which reflects only the witness' direct and redirect examination, and avoids intervening cross-examination.

witness fully agreed that under all the circumstances the latter is an ideal solution:

"Q. Now I pose to you this hypothetical. If we have the reef runway constructed—and I will state that as a matter of proof we will establish this—that the intention—the present plan is to have the larger aircraft taking off at the—on the reef runway and the present projected plan is to have the inter-island aircraft take off at the threshold of the present existing runway 8-26—would that not solve the problem that the APA is objecting to?

"A Well, I was not aware of that. My immediate question is: is as to why they do not recognize that safety factor now and allow us to go to the end of runway 8. They obviously are thinking about it because that's the plan to put us down there where we belong. Your point is correct—that we will have our own interval of take-off. The only question I would make that you have a 12,500 foot runway there now and I do not conceive that they will not be utilizing it regardless of what you've got.

"Q. We're talking about the—whether or not the reef runway project should be constructed or not.

"THE COURT: No, we're not.

"MR. HIGA: Excuse me, Your Honor. What—

"THE COURT: We're talking about whether or not the government has met the requirements of the statutes with respect to the expenditure of public funds on a significant project involving federal action.

"MR. HIGA: That's correct. I stand corrected on that phrasing.

"Q. (By Mr. Higa) My point was that wouldn't the construction of the reef runway project,

therefore, be a solution to the problems that the APA's is objecting to at this point?

"A. Yes, that point is made." [85]

Finally, and perhaps most remarkable of all, is the "evidence" upon which petitioners rely for the propositions that the project must be halted because the EIS contains no discussion of the possibility that the need for its construction might become unnecessary if the entire existing aircraft fleet were replaced by larger and quieter airplanes, and subjected to some sort of revised schedules, and that by declining to accept this notion the courts below were guilty of "brushing off the positive experience with these techniques at other airports." [86]

Petitioners' reference in this regard to "Tr. . . . 815-16 (National Transportation Report)" [87] is to a reading by counsel of excerpts from an article in a magazine called "Airport World," which purported to report upon a certain study, as follows:

"MR. SHERWOOD: It's two paragraphs, actually. It's captioned 1972 Transportation Report. After almost two years in the works, the 1,000-page 1972 National Transportation Report—

"THE COURT: Not so fast.

"MR. SHERWOOD: I'm sorry . . . . has been submitted by Secretary of Transportation, John A. Volpe. The first of its kind, the report contains a

[85] Transcript, pp. 226-27. The reference in the questions and answers to "APA" is to the Airline Pilots Association, of which the witness is a member and on behalf of which he sometimes spoke. *Id.* at pp. 208-209, 220.

[86] Petition, pp. 9, 19 (n. 7).

[87] *Id.* at p. 9.

> comprehensive picture of the present status of the nation's transportation system and the planning needed to improve it. And then there's a quote within the quote: Through this report and its successors, close quote, Volpe said, quote, we shall present guidelines to all branches and levels of government involved in the attainment of the President's goal of a balanced transportation system, closed quotes within the quote.
>
> "The next paragraph says: The report lists a 27 billion dollar need for airports among other categories involved with the movement of people and goods through 1990. It's stated that significant reductions can be made in current and anticipated delays at the nation's large traffic hubs by making better use of existing capacity prior to investing in increased facilities. Potential remedial actions put forward included, the diversion of some general aviation traffic to existing reliever airports and the minor rescheduling of commercial flights around peak periods."

Petitioners' reference to "'The Jamaica Bay-Kennedy Airport, A Multi-Disciplinary Environment Study,' in evidence as P-4(a) and P-4(b); Tr. 407-13, 423-4, 427-31 (testimony of Prof. Joseph Sax)"[88] is evidently to the "testimony" of a law professor, which was actually legal argument heard by the district court, nevertheless, from the witness stand rather than from the bar in the guise of expert opinion concerning "industry practice" in the business of preparing environmental impact statements for airport projects.[89]

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[88] Petition, p. 9.

[89] In response to obvious objection that law professors should not be instructing district courts on the law from the witness stand, the district court invited the professor's association as coun-

The witness discoursed at some length as to his views of what should go into an EIS in order to comply with NEPA and AADA, relying largely in that regard upon the so-called "Jamaica Bay" study, which he helped prepare, as "a useful and instructive model . . . for what an environmental impact study for an airport should be . . . ."[90] That voluminous study itself was offered into evidence "as illustrative of his testimony and not for the truth of the facts stated therein."[91] It was noted in passing that this "model" Jamaica Bay study discussed such things as using larger and quieter aircraft and revising flight schedules.[92] The apparent implication was and is that since a "model" EIS discusses such things and the one before us does not, it necessarily follows that the one before us is fatally defective.[93] How or why such an implication might be made, and how or why purported solutions to New York problems could be said to be otherwise applicable holus-bolus to Honolulu, was unexplained by evidence or argument. Indeed, the witness himself qualified his reliance upon the Jamaica Bay-Kennedy Airport study by noting that its content was significant "as to *that* airport at least," and that he did "not know to what extent this particular example ap-

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sel, in which capacity he might have presented argument in the usual way. Transcript, pp. 399-401. Petitioners declined this invitation and insisted that the professor "testify." The district court relented, saying, "Well, I'm going to let him tell us all about it anyway." *Id.* at p. 402.

[90] Transcript, p. 431.

[91] Transcript, p. 447.

[92] *Id.* at pp. 408-413.

[93] *Cf.* Transcript, pp. 423-24.

plies to your airport here."[94] Certainly there was no evidence or argument as to how or why the Kalihi-Palama residents, for example, not to mention the inhabitants of the federal courthouse in Honolulu, would or should consider their death and destruction as a result of crash in their midst of a new, larger and quieter rescheduled aircraft as a "reasonable and feasible alternative" to a similar disaster resulting from crash of an aircraft of present design operating under present schedules.

Be that as it may, there was, again, additional evidence on the subject not mentioned in petitioners' "statement of the case." For example, a responsible FAA official, found by the district court to be at least as qualified as the petitioners' Prof. Sax to testify concerning "industry practices" in the business of preparing environmental impact statements affecting airports,[95] advised that among the 282 environmental impact statements involving airports which he has reviewed not a one contained discussion of the imaginative "non-construction" alternatives which petitioners and their witness lately suggested.[96] This tended to establish that the "custom in the industry" upon which petitioners rely[97] would have to be found by a trier of fact to have arisen from a single unique case which, moreover, didn't involve NEPA or AADA in the first

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[94] *Id.* at pp. 409, 412 (emphasis added). Among other things, the witness hadn't read the extensive references of the EIS here. *Id.* at pp. 420-21.

[95] Transcript, p. 761.

[96] *Id.* at p. 763.

[97] *Id.* at p. 423.

place.[98] The courts below were evidently unconvinced that fact-finding indulgence to that extent ought be extended to petitioners. Furthermore, it appeared that such matters as rescheduling, development of quieter and larger airplanes and traffic control improvements are long-term goals being extensively investigated, at a cost of many millions of dollars, on a nationwide basis, repetition of which in connection with the short-term needs of particular airports would be inappropriate;[99] and that "the responsible officials are well aware of the programs going on a national basis that deal with these issues and that in particular airport development projects such as this, they had no bearing, except in the long run we're doing our damnedest to improve situations."[100]

When all was said and done, the district court found, under all of the circumstances and upon the evidence adduced, that

> ". . . the discussion set forth in the EIS complies with the requirements of NEPA, or that in those instances where additional discussion or disclosure should be set forth in the EIS the only delinquency is in draftsmanship and not in any failure to consider the deleted matter as if it had been set forth

[98] It was also made to appear that the Jamaica Bay study was a non-federal undertaking commissioned at a time when "NEPA was brand new and . . . was one of the first reports that [federal officials] had seen that looked at the environment." It was seen at the time as "a good report . . . as applies to the New York area," but no request for federal aid was involved, neither NEPA nor AADA were applicable, and the study was never before the Secretary or other appropriate federal agencies for official review and decision. Transcript, p. 802.

[99] Transcript, pp. 761-63.

[100] *Id.* at p. 810.

> in full in the EIS, or that the question raised by plaintiffs is one to which the EIS need not address itself . . . .
>
> ". . . . [I]t does appear from the evidence that the responsible officials in the decision making process and in the review processes did in fact consider many alternatives, including nonconstruction alternatives. I am persuaded that Mr. Thompson is right when he argues that a detailed discussion of national programs to reduce noise pollution and to improve operational efficiency should not have to be repeated in every EIS for every airport project." [101]

The court of appeals concurred, noting, among other things, that "there is nothing in the record to indicate that alternatives such as the readoption of airline schedules, imposition of curfew restrictions, or conversion to wide-body aircraft design are either reasonable or feasible alternatives in this case." [102]

ARGUMENT

I

To the Extent Discernible, Petitioners' Grievances Are Those of the Disappointed Litigant Whose Claims Have Been Heard Fully, Fairly and at Great Length by Two Lower Courts and Been Found Wanting in Fact. This Court's Certiorari Power Ought Not Be Consumed in Review of Factual Questions.

This is not a case arising on pleadings or otherwise preliminarily in which a litigant has been denied opportunity to air his grievances on the basis of some stark question of law. To the contrary, petitioners succeeded, if anything too well, in commanding the

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[101] 363 F.Supp. at 1174, 1175, App. C of Petition, pp. 37, 39.

[102] 485 F.2d at 471, App. A of Petition, pp. 23-24.

priority attention, ahead of other litigants awaiting the courts' services, of two lower courts—the District Court for the District of Hawaii and the Court of Appeals for the Ninth Circuit—at almost unseemly length, and were given the fullest opportunity to substantiate their claims by factual demonstration and argument upon preliminary hearing, trial and appeal.[103] Petitioners do not suggest otherwise. It has been seen that these lower courts found petitioners' claims to be wanting in fact.

To the extent discernible from the obscure petition,[104] petitioners seem to be claiming now, while disdaining to identify the compelling considerations which might lead to a conclusion that the lower courts' appraisals of the evidence were clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure, or otherwise, that the courts below should have given

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[103] Complaint was filed in the district court on November 8, 1972. By December 22, 1972, petitioners had enjoyed fully seven day's hearing attention and consideration of thousands of pages of documentary materials. On March 29, 1973, petitioners declined opportunity to present further evidence at trial on the merits. Final judgment of the district court was entered on April 13, 1973. Appeal to the 9th Circuit, filed April 27, 1973, was treated on an expedited basis. By August 7, 1973, the Court of Appeals had considered several hundreds of pages of briefs and heard oral argument at length well beyond normal time limits. The court of appeals' decision was entered on September 10, 1973. 485 F.2d at 463. No doubt this Court may take judicial notice that "ordinary" litigants in federal courts do not enjoy similar volume and speed of judicial attention.

[104] *Cf.* Rule 23(4) of the Rules of this Court:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

greater weight to the "evidence," such as it was, offered by petitioners, and discredited the evidence given by respondents.

It has never been thought that this Court's important certiorari jurisdiction should be dissipated in rehash of facts which have been explored in depth by lower courts, particularly when a court of appeals has already fully reviewed and approved a factual analysis by a district court. *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U.S. 271, 274-75; *Berenyi* v. *Immigration Service*, 385 U.S. 630, 635. There is nothing in this case which recommends departure from that tradition.

II

Deficiencies in Petitioners' Proof Are Massive, Extending To Failure To Demonstrate So Much as Standing. Upon the Facts (or Lack Thereof) Here, There Is No Conflict With Decisions in Other Circuits.

Granting that this Court's office should extend to second-guessing of inferior courts' fact finding, it avails petitioners nothing, for even cursory review of the record discloses that they proved nothing. While the petition leaves some doubt on the subject, these respondents, at least, refuse to assume, even for purposes of argument, that petitioners would go so far as to suggest that the courts below should have acted in their favor on the basis of their bare allegations and argument, without regard to evidence, or lack thereof, adduced at trial.[105]

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[105] At one point, petitioners seem to be complaining that "the Ninth Circuit places the burden *upon Petitioners* to demonstrate" at least something (Petition, p. 15, emphasis in original), but elsewhere they seem to concede that it is required at least that "plaintiffs present *prima facie* evidence" (*id.* at p. 27).

Whatever other revolutions may have been introduced into the law by NEPA, AADA and related enactments concerning the environment, it has never been supposed that the courts, including particularly this Court, have thereby been ordained as roving supervisors of the environment obliged or even enabled to halt projects willy-nilly upon someone's mere complaint. Presumably NEPA and AADA leave intact the time-honored notion that the judiciary is essentially a passive instrument of government, which acts only when someone convincingly demonstrates a justiciable grievance. This basic notion is more, not less, pertinent in the currently emotional context of "environmental" concern. Rape of the land, like rape of a human female, as Lord Hale observed in the latter case some 300 years ago, "is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, tho never so innocent." *I. M. Hale, Pleas of the Crown* 635. In a word, it takes more than inflammatory words to excite a court to action. He who claims judicial relief must prove its need.

At the very least, the seeker of judicial intervention must demonstrate that he has "standing" to invoke the judicial machinery; that he is or will be injured or aggrieved in the sense of being "a person with a direct stake in the outcome of a litigation—even though small," as distinguished from "a person with a mere interest in the problem." *United States* v. *SCRAP*,——U.S.——,——, 37 L.Ed.2d 254, 270-71, n. 14. The courts below erred, if at all, only in entertaining petitioners' strident nit-picking grumbling to the lengths they did after it became, or should have become, clear that petitioners were unwilling or unable to satisfy this threshold requirement.

It may be conceded for this purpose that some relaxation of the usual requirement that the applicant for exercise of a court's awesome injunctive power show direct injury to himself may be warranted in so-called "environmental" cases, but certainly relaxation does not go beyond that suggested by Justices Blackmun and Brennan concurring in *United States* v. *SCRAP, supra,* to the effect that:

> ". . . responsible and sincere representatives of environmental interests, show that the environment would be injured in fact and that such injury would be irreparable and substantial." (37 L.Ed.2d at 276).

It may also be conceded that at the outset petitioners had sufficiently alleged that form of irreparable injury to the environment, if not themselves, which would meet such relaxed test of standing. However, mere allegation is not enough. As stated in *SCRAP*:

> "Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial." (37 L.Ed.2d at 270).

When all was said and done at an extensive trial, and upon a searching appeal, it was found that petitioners had not proven any manner of injury to the environment in fact save disturbance to certain bird habitats, and that that adverse environmental effect, moreover, was in all respects reparable and being repaired by costly inclusion in the project of replace-

ment habitats for the displaced birds. 485 F.2d at 473. Claiming no error in that finding, and indeed omitting challenge of finding that on the whole the project will *improve* the environment by eliminating the spectre of a disastrous aircraft accident in a populated area, reducing noise pollution by moving it more than a mile away, reducing air and water pollution, enhancing recreational boating facilities, and improving area fishing, 485 F.2d at 465, petitioners remit themselves to claim, in effect, only that the same enviornmental benefits might have been achieved at lesser monetary cost by means of certain alternatives which they suggest, and that pursuit of such monetary savings may have been dissuaded by the biased influence of a private contractor who participated in analysis of the project and the preparation of an EIS. In the absence of a showing, or justiciable claim, of environmental harm cognizable under NEPA, the concerns underlying these claims are essentially political ones shared with petitioners by all citizens and taxpayers. There is no apparent reason why petitioners should have special standing to require this Court, or any other, to pass upon such questions.

Given that inquiry on these subjects at the behest of petitioners, or at all, is appropriate at this juncture, petitioners' contentions are plainly without merit in the light of the record which they made, or rather didn't make.

Far from placing itself at odds with the decision of the District of Columbia Circuit in *National Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827 (1972), as suggested by petitioners,[106] the court of appeals here

[106] Petition, p. 21.

actually and quite properly took that case as its text.[107] Unlike this case, *Morton* did not arise on appeal from a full trial on the merits, but on a motion for summary reversal in connection with an appeal from the grant of a preliminary injunction. While by no means required so to do, the court discoursed at some length concerning NEPA's requirement of consideration and discussion of alternatives to a project for guidance on remand. In so doing, the court indicated that certain "alternatives" suggested by plaintiffs in that case need not have been discussed in an EIS or otherwise considered, but that still other alternatives suggested by plaintiffs might or might not have required report of attention depending upon ultimate proof, saying, among other things, that the test in the final analysis should be that:

> ". . . [T]he requirement in NEPA of discussion as to reasonable alternatives does not require 'crystal ball' inquiry. Mere administrative difficulty does not interpose such flexibility into the requirements of NEPA as to undercut the duty of compliance 'to the fullest extent possible.' But if this requirement is not rubber, neither is it iron. The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite.
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> "* * *
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> "In the last analysis, the requirement as to alternatives is subject to a construction of reasonableness, and we say this with full awareness that this approach necessarily has both strengths and weaknesses . . . .

[107] 485 F.2d at 472, App. A of Petition, p. 24.

> "There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of 'alternatives' put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, . . . making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.
>
> "A final word. In this as in other areas, the functions of courts and agencies, rightly understood, are not in opposition but in collaboration, toward achievement of the end prescribed by Congress. So long as the officials have taken the 'hard look' at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken." (458 F.2d at 837-38).

Any notion that an EIS conformable to NEPA must anticipate every conceivable "alternative" which any Monday morning quarterback might dream up, in contrast to the rule of reason posited by the District of Columbia Circuit, is, of course, silly on its face. Other courts of appeal have likewise seen a need for injection of some measure of reason in consideration of "alternatives" to projects said to disturb the environment. Likewise by way of guidelines on remand, the Fifth Circuit, for example, observed in *Allison* v. *Froehlke,* 470 F.2d 1123, 1128 (1972), that

> ". . . The trial, if possible, should be kept within reasonable limits. Undoubtedly witnesses and experts can be found who, because of their predilections, will advance their own theories as to how the project should be carried out—if at

> all. The number of potential alternatives may well be in direct ratio to the number of experts called. To some, even the habitat of the 'rare golden-cheeked warbler' should be preserved despite the damage and dangers caused by floods. However, the selection of the important and dispositive issues will be for the trial court . . . ."

Applying, not defying, the cogent analysis of the *Morton* case, and decisions of other courts which have consistently followed it without discernible conflict, the court of appeals read the full trial record here as showing in fact that the "alternatives" urged by petitioners were either not alternatives at all, in the sense that they did not tend to solve the problem to which the project is addressed, or that they were simply not reasonable and feasible. In this the court of appeals had ample substantial record support. Apart from positive testimony by a responsible federal official to the effect that so-called "non-construction' alternatives suggested by petitioners are and have been under consideration by appropriate federal agencies as long-term solutions to airport problems, but are inappropriate to the short-term needs of a particular airport, certain of the suggested "alternatives" are on their faces "remote and speculative" and "not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed," within the meaning of *Morton*. Obviously, for example, it makes no sense to suggest that as an alternative to relief from noise pollution and crash hazards sought by Honolulu residents *now*, they should await some indefinite future date when newer, larger, quieter and safer airplanes might be developed and substituted for the existing multi-billion dollar aircraft fleet.

It is difficult to perceive how an issue under *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, could be said to be involved here. That case held simply that review of an administrative determination that no reasonable and feasible alternatives to a project exist should not be confiined to consideration of self-serving affidavits in support of a motion for summary judgment. A summary judgment was there reversed in favor of more searching inquiry, which it was noted could extend to requiring "the administrative officials who participated in the decision to give testimony explaining their action" (401 U.S. at 420), but which in any case must be sufficient to enable the reviewing court "to find that the Secretary could have reasonably believed that . . . there are no feasible alternatives," considering in that connection "whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment" (*id.* at 416). It was noted that:

> ". . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." (401 U.S. at 416).

Unlike the petitioners in *Overton*, the petitioners here were plainly not the victims of a summary judgment. On the contrary, they were the beneficiaries of precisely that sort of "searching and careful" inquiry which *Overton* mandates; administrative officials testified explaining why they did not look upon the "alternatives" suggested by petitioners as reasonable or feasible ones, and were subjected to extensive cross-examination; all things considered, the courts below were satisfied with the explanations, and

otherwise that "the Secretary could have reasonably believed that in this case there are no feasible alternatives," in all respects in accord with *Overton*. There is no basis for suggestion that the decision of the court of appeals here conflicts with *Overton*, much less *Morton*.

Similarly, petitioners' insistence that the decision of the court of appeals here in some way conflicts with that of the Second Circuit in *Greene County Planning Board* v. *Federal Power Com'n*, 455 F.2d 412 (1972), *cert. den.* 409 U.S. 849, is based on assumption of a factual predicate which is not only lacking from but at odds with the record here. That is to say, in *Greene* it was found as fact upon the record of hearings held for that purpose that

> "The Federal Power Commission has abdicated a significant part of its resposibility by substituting the statement of PASNY for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire." (455 F.2d at 420).

While petitioners assuredly *alleged* that the government had similarly delegated the preparation of an EIS to another here, the allegation was simply not borne out by the evidence from which it was clear that federal officials at all times played an active and responsible role in developing the EIS, and, indeed, that it was the purported delegee who performed an essentially clerical and editorial role in collating the comments and instructions of the administrators. Even petitioners yield to the record to some extent by asserting now not that the private consultant had wholly usurped federal responsibility, as originally alleged,

but that it "actively participated in the preparation of the EIS." Petition, p. 28. It has been seen that petitioners' statement in this regard that they "were precluded by the trial court from developing" the subject is simply a misstatement of the record. On the contrary, petitioners were afforded every opportunity to examine the officials, state and federal, not to mention the private consultant, concerning this matter, and were "precluded" in that regard only by the district court's unquestionably proper discretionary limitation of interrogation when it descended into time-wasting pursuit of unproductive minutiae. See *Cafasso* v. *Pennsylvania R. Co.*, 169 F.2d 451, 454 (3rd Cir. 1948); *New England Trust Co.* v. *Farr*, 57 F.2d 103, 110 (1st Cir. 1932); proposed *Rules of Evidence for United States Courts and Magistrates*, Rules 403 and 611(a). No "delegation" question under *Greene* or otherwise survives.

III

The Existence of Possible Nuances of Difference Among the Circuits in Defining the Precise Standard of Review in a NEPA Case Could Be of Only Academic Interest in This Case, Where the Basis of Review Was Inquiry Sufficiently Broad To Accommodate Any Conceivable Test.

Without undertaking to point out precisely how they would have fared differently had the court of appeals articulated the standard of review differently, petitioners complain that the Ninth Circuit applied the "very limited 'arbitrary and capricious' standard of review" of § 706(2)(A) of the Administrative Procedure Act, while other circuits have espoused somewhat more liberal standards, at least three different varieties of which petitioners purport to see in the cases. Petition, pp. 14-16.

While it may be doubted whether the apparent differences among the circuits in this regard are substantial, as distinguished from merely semantic, these respondents are constrained to agree with petitioners that various circuits have formulated the applicable standards of review in NEPA cases in somewhat different terms. Indeed, it may be acknowledged that even different panels within the Ninth Circuit are not agreed upon the precise categorization and verbalization of the applicable test. Compare the opinion of the panel here with the opinions of other panels of the Ninth Circuit in *Environmental Defense Fund, Inc.* v. *Armstrong*, 487 F.2d 814, 817 (Nov. 9, 1973), and *Lathan* v. *Volpe*, Nos. 72-2932 and 72-2974, December 7, 1973, Slip Opinion, p. 4.

There may be cases in which a difference between an "arbitrary and capricious" test and a "reasonableness" test may be operative, and in which it would become profitable to wrangle with or reconcile the differing formulations of the several circuits. This, however, is not one of them. It may be noted that the *district* court's opinion may be searched in vain for espousal of any particular formulation of a specific standard or review. Instead, as is apparent from the face of the record and its opinion, the district court, transcending subtleties on this subject, proceeded to conduct a full and searching inquiry into the facts concerning the project and petitioners' grievances in connection therewith, sufficient to accommodate any conceivable standard of review, and, without regard to which party or parties had the burden of proof or to what extent, came away satisfied that in fact the appropriate administrative officials had fairly, adequately and reasonably taken that "hard look" at environ-

mental consequences which, in the end, is the ultimate purpose of NEPA and AADA. A tendency to refuse to grapple with formal standards of review, and to go to the substantive heart of things by searching inquiry, in the spirit of *Overton*, seems to be characteristic of district courts. *Cf. City of New York* v. *United States*, 344 F.Supp. 929, 940 (E.D. N.Y. 1972).

The record situation here is such that settlement of precise definition of the standard of review is unnecessary because the result would manifestly have been the same under any imaginable standard. One need go no further than the Ninth Circuit itself for confirmation of this observation. In *Lathan* v. *Volpe*, Nos. 72-2932 and 72-2974, December 7, 1973, a different panel of that circuit, some weeks after the decision in this case, expressed doubted that the panel in this case had applied the proper standard of review, but noted that that couldn't have made any difference:

> "... In *Life of the Land* v. *Brinegar*, 9 Cir., 1973 [485 F.2d 460, 469] ... we quoted *Jicarilla Apache Tribe, supra*, regarding substantive decisions, but then apparently applied § 706(2)(A) to the question whether the EIS satisfied the requirements of NEPA . This appears to be a misreading of *Jicarilla Apache Tribe*, but our reading of *Life of the Land* convinces us that the result would be no different if we had thought that § 706(2)(D) applied. We later said as much in *Environmental Defense Fund, supra* [487 F.2d at 817], fn. 7...." (Slip Opinion, p. 4).

In *Environmental Defense Fund, Inc.* v. *Armstrong*, 487 F.2d 814, 817 (November 9, 1973), still another panel of the Ninth Circuit, which entertained still a different view of the applicable standard, likewise saw

the difference, however, as not making any difference in the context of the particular record before it:

> "*But see* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1280 (9th Cir. 1973), which uses 5 U.S.C. § 706(2)(D) as the appropriate standard, permitting appellate review of findings and conclusions found to be 'without observance of procedure required by law.' Under the circumstances of this case, either test would lead to the same result."

Likewise to the effect that grappling with the definition of the proper standard of review is an unnecessary exercise in academics when a trial court has conducted a full inquiry and made findings accordingly, see *Hanly* v. *Mitchell,* 460 F.2d 640, 648 (2nd Cir. 1972), and compare *Sierra Club* v. *Froehlke,* 345 F. Supp. 440 (W.D.Wisc. 1972), *aff'd* 486 F.2d 946, 951 *et seq.* (7th Cir. 1973).

In the final analysis, three respondents agree that petitioners are probably correct in their observation that there seems to be some uncertain confusion among, not to mention within, the circuits concerning the precise standard of review in environmental cases. Respondents also agree that a time and case may come in which it would be desirable for this Court to exercise its certiorari jurisdiction to put the matter to rest. Respondents submit, however, that a decision by this Court on that subject would be far more meaningful in the context of a case in which subtle distinctions in the verbalization of the standard of review could be said to be realistically operative, as distinguished from this case, in which any pronouncement on the subject would necessarily be little more than an exercise in academics.

IV

In Any Event, the Relief Sought by Petitioners Is Equitable Injunction, the Availability of Which Depends Not Alone on Relative Legalities But on a Discretionary Balancing of the Interests Affected. There Is Not the Least Hint in the Petition That the Courts Below Abused Their Discretion in Withholding That Drastic Remedy Here.

Petitioners' ultimate, indeed only, prayer, of course, is not for damages at law, or for declaratory relief, or even for mandatory injunction requiring federal officials to do something they should have, but for equity's ultimate weapon, prohibitory injunction halting the project and wreaking the consequences of that event until, presumably, their demands have been met.[108] Without ending inquiry, therefore, petitioners' surviving claims might be credited at face value, and there would still remain a need for petitioners to demonstrate to this Court that the courts below abused their discretion in withholding injunctive relief, for it has long been clear that mere proof of legal irregularity gives rise to no absolute claim of right to a court's equity jurisdiction. Indeed, even proven violation of the Constitution itself is no basis for exercise of a court's awesome injunctive power in the absence of a court's discretionary satisfaction that the relative equities so require, for, as this Court noted in *Lemon* v. *Kurtzman*, 411 U.S. 182:

> "In equity as nowhere else courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding those interests have constitutional roots."

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[108] It is no doubt anomalous to speak of *permanent* injunctions in a NEPA context. The notion that a court could permanently enjoin the State of Hawaii or anyone else from prosecuting a given public project on environmental grounds is so obviously a violation of fundamental division of governmental powers as to be beyond discussion. A court's powers end when the law's demands have been met.

There is no reason for supposing, and certainly petitioners have suggested none, that alleged environmental concerns occupy a higher estate in equity than proven constitutional violations, or that a traditional balancing of equities is not called for in a case of purported environmental "damage." Mr. Chief Justice Burger, speaking as Circuit Justice for the District of Columbia, said as much in *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 409 U.S. 1207:

> "Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulations. The decisional process for judges is one of balancing and it is often a most difficult task."

When the same case reached the full Court *sub nom. United States* v. *SCRAP,* —— U.S. ——, 37 L.Ed.2d 254, it was found to be unnecessary to "reach the issue whether, under conventional standards of equity, the District Court was justified in issuing a preliminary injunction," because it was held that "the Court lacked jurisdiction to enter an injunction in any event" (37 L.Ed.2d at 271). The implication, albeit dictum, was clear that NEPA does not otherwise do away with a court's conventional discretion to grant or deny injunctive relief according to its balancing of the equities, which will not be disturbed in the absence of convincing demonstration of outright abuse. Mr. Justice Marshall, indeed, in concurring and dissenting, made an affirmative plea for preservation in the courts of "their traditional responsibility, in passing upon a

request for equitable relief, to work an accommodation in each particular case of the competing interests of the relevant parties." (37 L.Ed. at 295-96).

Petitioners, understandably, do not address themselves to the necessity for balancing equities in adjudging the availability of injunctive relief, for the record starkly reveals that the equities so overwhelmingly favor completion of the project as to make discussion on the subject unnecessary. On the one hand, it is clear, and in any case at this stage of the proceeding undisputed, that the project will relieve the Kalihi-Palama neighborhood and the downtown sections of Honolulu of serious noise pollution and imminent danger of disastrous aircraft crash in their midst. On the other hand, petitioners have shown no more than that completion of the project will displace a customary habitat of some 20-100 rare birds, which may or may not find sufficient comfort and refuge in replacement habitats being provided for them in connection with the project at a cost of more than $350,000, and which, moreover, could easily be enlarged and enhanced for the further comfort of the birds if the expressed fears of petitioners should come to pass, even though the project proceeds to completion. Any suggestion, even had petitioners deigned to make one, that the courts below abused thir discretion in striking the balance in favor of people under the circumstances, would have been totally untenable.

Furthermore, there can be no question that courts do not in any event use their injunctive powers as *terrorem* devices to punish those who might depart from strict legal requirements in some regard, but only as a means of doing some positive good. If not wholly moot at this point, grant of petitioners' prayer

for prohibitory injunction at this time would serve no known good. Speaking as of November 13 1973, at a time when the project had been briefly halted by an order of Mr. Justice Douglas one Dr. Karl H. Bathen, an expert oceanographer who had appeared as a witness for petitioners, deposed that failure to complete construction from its present stage of progress could result in some manner of environmental harm in the form of disturbance of ocean currents, or as the deponent put it, "subsurface flushing." From November 1973 to date, construction has proceeded apace, the birds have since been displaced and remitted to their new $350,000 homes. There is no known, much less proven environmental benefit which could be gained or preserved at this juncture by grant of petitioners' prayer for injunction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied, or, if granted, that the decision of the court of appeals should be summarily affirmed.

Respectfully submitted

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February 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1088

LIFE OF THE LAND, *et al.*,

Petitioners,

—v.—

CLAUDE S. BRINEGAR,
SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT E. ALVEY WRIGHT, DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION, IN OPPOSITION

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February, 1974

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In the

Supreme Court of the United States

October Term, 1973

No. 73-1088

Life of the Land, *et al.*,

Petitioners,

—v.—

Claude S. Brinegar,
Secretary of Transportation, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT E. ALVEY WRIGHT, DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION, IN OPPOSITION

OPINIONS BELOW

The unanimous opinion of the Court of Appeals for the Ninth Circuit affirming the District Court's judgment is now reported at 485 F.2d 460; it appears as Appendix A to the Petition.

QUESTIONS PRESENTED

1. Whether the courts below applied the proper standard of review when they found on the evidence of record that it was reasonable for the Federal Aviation Administration to have omitted from the Environmental Impact State-

ment ("EIS") prepared for use under the National Environmental Policy Act ("NEPA") and the Airport and Airways Development Act ("AADA") for the airport expansion involved here, a discussion of certain alleged "alternatives" to the proposed expansion, claimed for the first time in the courts by Petitioners (who participated in the administrative process) as being alternatives worthy of consideration.

2. Whether the findings made by the Department of Transportation as to the expansion project satisfied § 16 (c) (4) of the AADA.

3. Whether it was permissible under the NEPA for the Federal agency to have permitted a private contractor to participate in the drafting of the EIS for the project where the agency itself participated substantially in all stages of the drafting and exercised control over the content of the EIS.

STATEMENT

The Reef Runway project at Honolulu International Airport ("HIA") will add a new principal runway 6,700 feet south of the existing HIA runway system on the fringing coral reef seaward of Keehi Lagoon in Mamala Bay. As indicated in the map appearing at p. 5, this new Reef Runway will move the flight patterns for much, although not all, of the HIA air traffic out over Mamala Bay and away from the densely populated areas of Honolulu currently subject to overflights.[1] As a result, the Reef Runway

[1] The map shows the pattern of takeoffs and landings during so-called "Kona wind" conditions. During "trade wind" conditions, the areas of flight are substantially the same, except that takeoffs and landings are from west to east, rather than from east to west.

will reduce the level of aircraft noise over metropolitan Honolulu; improve safety and reduce the possibility of loss of life by decreasing the number of takeoffs and landings over highly populated areas; increase the capacity of HIA to the level necessary by 1975; and provide an alternative runway during periods when the existing principal runway is under repair. (EIS 5)[2]

A. Factual Background

1. *The Need for the Reef Runway*

The State of Hawaii is approximately 2,400 miles from the continental United States. Over 99% of all passengers, and a significant amount of goods, travel to and from Hawaii by aircraft. During periods of ship or dock stoppages, the airplane is the only means of transportation to or from Hawaii. Honolulu, on the island of Oahu, is Hawaii's largest population center and HIA is Hawaii's major airport. As such, it not only handles a large and growing volume of traffic to and from the mainland and among the Hawaiian Islands, but is now the third largest point for international arrivals in the United States. In addition, since the closing of the runway at the adjacent Hickam Air Force Base, HIA is also a substantial center for military aircraft operations.

The number of aircraft operations (arrivals and departures) at HIA has been steadily increasing, from 257,000 per year in 1961 to 325,000 in 1970. (EIS 1) Present fore-

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In either case, takeoffs or landings are over the densely-populated Kalihi-Palama area and this would be avoided by the pattern indicated for the Reef Runway takeoffs and landings.

[2] We so refer to the final Environmental Impact Statement prepared in connection with the Reef Runway project.

casts indicate that the number of aircraft operations will increase to 382,000 by 1975 and 493,000 by 1985. (EIS 5) Despite this heavy usage of HIA, the airport has at present a single principal runway, known as 8L-26R, used during prevailing wind conditions. At present, the 8L-26R runway is operating at capacity several hours daily, and by 1975, if no additional facilities are provided, will be operating at daily and annual capacity. (EIS 5)

Runway 8L-26R extends from west to east and is so located that arriving and departing aircraft must fly over densely populated portions of the Honolulu metropolitan area. These overflights by heavy jet aircraft result in excessive noise pollution in a number of areas of metropolitan Honolulu. Studies of jet noise in the area of HIA have shown that over 130,000 residents are subject to a noise level of 85 decibels or more. Furthermore, the areas of metropolitan Honolulu currently subject to overflight have a heavy concentration of schools, as shown in the map on p. 5, and as a result some 13,000 school children in the Kalihi-Palama area (east of HIA) are subject to noise levels of up to 105 decibels for as much as one hour each school day. (EIS 12-14) The Council on Environmental Quality indicates that an 85-decibel noise level is equivalent to that of a pneumatic drill at 50 feet and ranks the discomfort resulting from such a noise level as midway between "annoying" and "hearing damage (8 hours)."[3] Residents west of the airport are subject to lower, but still significant, noise levels. (EIS 13)

In addition, the location of the present runway 8L-26R creates a significant safety hazard by reason of the overflights of densely populated areas. (EIS 5) Thus, in the

[3] *Environmental Quality*, The First Annual Report of the Council on Environmental Quality (1970), p. 125, cited at EIS 14.

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HICKAM A.F.B.
FORT KAM ARMY HOUSING
PEARL HARBOR CHANNEL
HICKAM HARBOR
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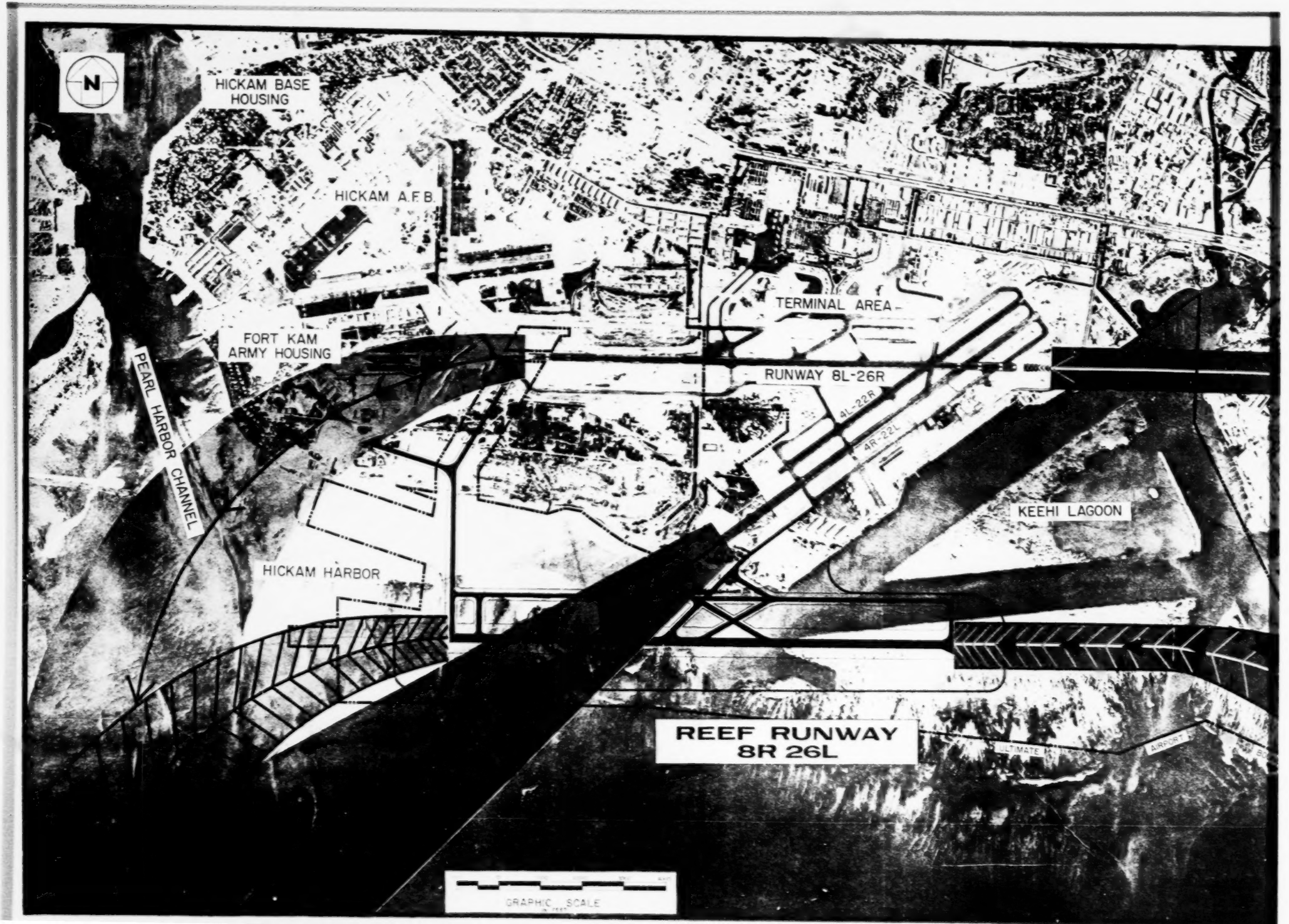
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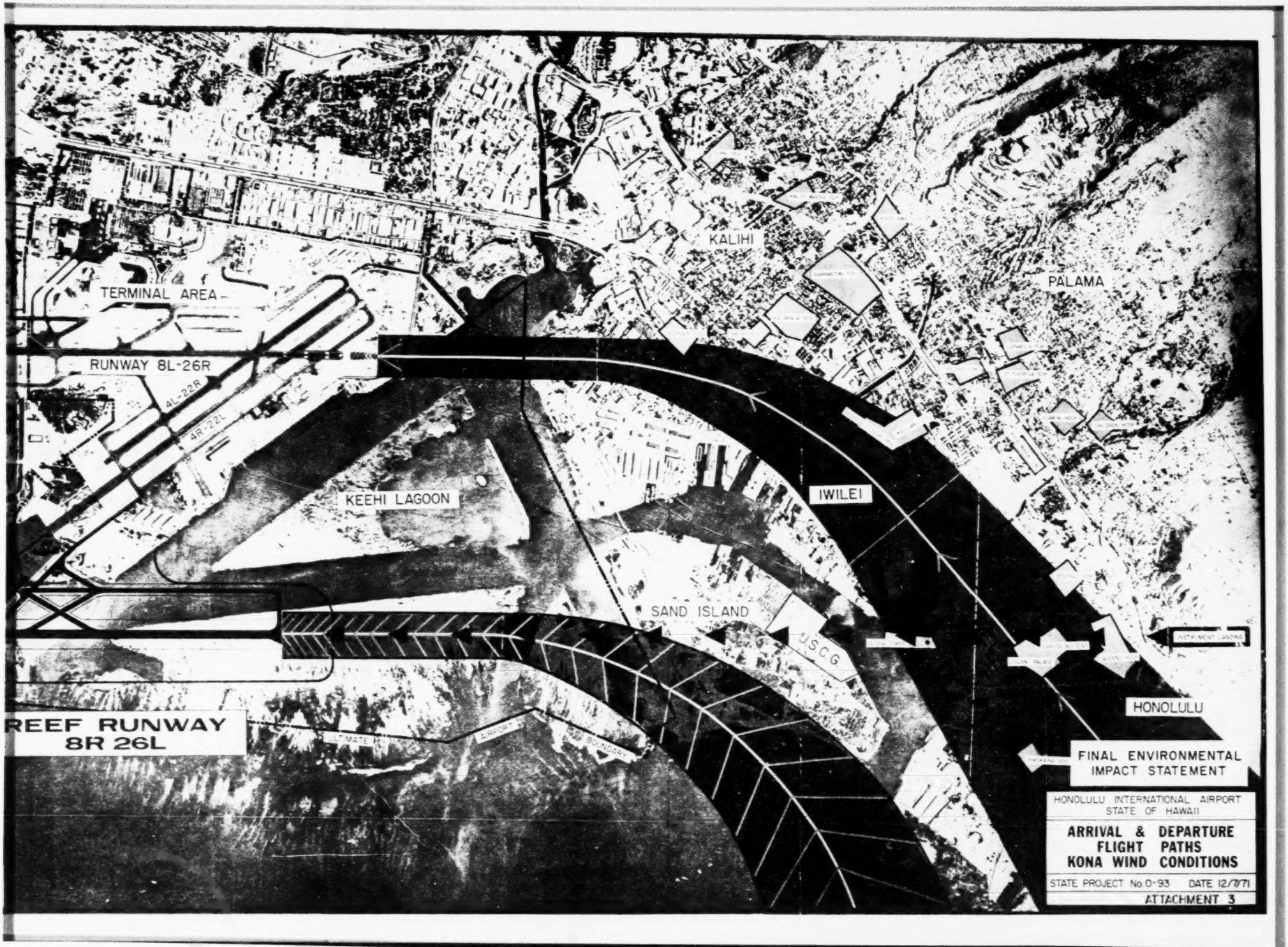
HICKAM HARBOR
REEF RUNWAY 8R 26L
GRAPHIC SCALE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TERMINAL AREA
RUNWAY 8L-26R
4L-22R
4R-22L
KEEHI LAGOON
IWILEI
SAND ISLAND
USCG
HONOLULU
REEF RUNWAY
8R 26L
FINAL ENVIRONMENTAL
IMPACT STATEMENT
HONOLULU INTERNATIONAL AIRPORT
STATE OF HAWAII
ARRIVAL & DEPARTURE
FLIGHT PATHS
KONA WIND CONDITIONS
STATE PROJECT No 0-93 DATE 12/1/71
ATTACHMENT 3

event of an air crash just after takeoff or prior to landing, the potential for loss of life on the ground is high. (Tr. 700-04; 708-11) These considerations of safety are of more than usual importance at HIA because large numbers of takeoffs and landings are by Air Force KC-135 tanker aircraft carrying up to 160,000 gallons of highly flammable jet aviation fuel. (Tr. 709-10)

2. *Preliminary Studies and the Adoption of the Reef Runway Project*

The severe problem with aircraft noise first appeared with the introduction of jet aircraft in approximately 1960. In February, 1961, the Senate and House of Representatives of the first legislature of the State of Hawaii resolved to seek a solution to the noise problem, and the following year the Hawaii House of Representatives reaffirmed that intention. As a result, the State initiated a study on the means of eliminating the excessive aircraft noise at HIA. (Tr. 492-94) This early study, which was utilized in the consideration of the Reef Runway project here at issue, called for the construction of a new "seaward jet runway" to be aligned so as to minimize noise-pollution problems. However, this particular proposal was never acted upon because the prevailing crosswinds would have made the proposed runway unsafe. (Tr. 698-700)

In 1966, the State of Hawaii retained consultants to prepare a Honolulu International Airport Development Plan which, *inter alia*, examined various alternative runway possibilities. (Tr. 496-97) The HIA Development Plan recommended that a new 12,000-foot runway be constructed 1,300 feet south of and parallel to the existing 8L-26R runway. (Tr. 497) In 1967, the Governor of Hawaii appointed a special Task Force to review the proposed master plan. The Task Force came into existence in February, 1967, and

continued its operations until April, 1970. Among the members of the Task Force were the Regional Director of the Federal Aviation Administration, other State and Federal officials, representatives from the airlines and the military and personnel from newspapers and other interested organizations. Virtually all of the 46 Task Force meetings were open to the public. (Tr. 500-05)

The Task Force reviewed the 1967 Development Plan in light of its objectives of (1) reducing noise pollution in affected portions of the Honolulu metropolitan area; (2) increasing the margin of safety in case of aircraft crashes by moving the flight patterns away from populated areas; (3) providing an alternative principal runway during maintenance of the existing runway; and (4) providing sufficient runway capacity to accommodate predicted increases in operations. The Task Force found that the runway proposed by the 1967 HIA Development Plan did not promise to reduce substantially the level of aircraft noise because it was located only 1,300 feet seaward of the present runway. Furthermore, the close-in parallel runway would not have substantially improved the safety conditions since use of it would still have involved overflights of relatively heavily populated areas. Thus, the Task Force recommended to the Governor that the new runway be constructed 6,700 feet south of and parallel to the existing 8L-26R principal runway in order to move the aircraft flight pattern out over the ocean and away from populated areas. (Tr. 501) On August 20, 1968, the Governor approved this proposal for what has come to be known as the "Reef Runway" project.

A number of air carriers which used HIA were unsatisfied with the recommendation of the Task Force as adopted by the Governor. Because construction of the Reef Runway

would necessitate an increase in the landing fees charged to the airlines, they commissioned an alternative study by the Stanford Research Institute. This SRI report was presented to the Task Force on September 30, 1969. (Tr. 520-24) The report recommended that, in place of constructing the Reef Runway, the existing runway be extended and that a new, shorter runway be constructed to handle local inter-island traffic. The Task Force examined the airlines' study but rejected its conclusion on January 29, 1970, on the ground that it would not provide a satisfactory alternative to the Reef Runway. In particular, the Task Force objected that the SRI proposal would only move the noise problem to affect a slightly different portion of the densely-populated Honolulu metropolitan area. (Tr. 523, 536) Furthermore, the proposed alternative would not have solved the safety problem and would merely have postponed for a few years the saturation of HIA's facilities caused by increasing air traffic. (Tr. 524) The final recommendation of the Task Force, therefore, reconfirmed the Reef Runway project and was approved by the Hawaii Director of Transportation and the Governor of Hawaii on February 24, 1970. (Tr. 544)

3. *Keehi Lagoon and the Reef Runway Project*

Keehi Lagoon is a tidal lagoon located south and east of HIA. Separating the Lagoon from Mamala Bay is a fringing coral reef upon which the proposed runway is being built.

Prior to World War II, Keehi Lagoon was a tidal mudflat with sections ranging in depth from a few inches to several feet. One channel provided the only navigable ingress and the Lagoon was little used. During World War II, however, the U. S. Navy began dredging operations which created three seaplane runways. These runways are

1,000 feet wide and between 10,000 and 16,000 feet long. They are situated at the three outer edges of the Lagoon, leaving the mudflats in the center of the Lagoon unchanged. (EIS 5-6)

When the dredging was commenced, the exigencies of World War II were such that scant attention was given to the circulation pattern of water in the Lagoon. (EIS 6) As a result, the dredging created water circulation patterns which trap pollutants in the Lagoon. This, combined with the discharge of some 55,000,000 gallons of raw sewage into Mamala Bay by the city and county of Honolulu (EIS 18), has resulted in the Lagoon's present polluted condition. Thus, while the Lagoon is now somewhat used as a recreational area, recreational uses are primarily limited to uses such as fishing and boating which do not require significant personal contact with the water. (EIS 16) The Lagoon is also the habitat for a small number—between 20 and 100—of the Hawaiian Stilt, a rare bird which uses the mudflats of the Lagoon in the area between the seaplane runways as a seasonal feeding and roosting ground from June to January.[4] (Tr. 674; Ds. Ex. 44)

The proposed Reef Runway will divide Keehi Lagoon and utilize about 765 acres of offshore land for the runway itself and the runway's protective structure. (EIS 11-12) In addition to the runway and appurtenances, the project will involve the creation of the two new deepwater channels. These channels will allow small boats access to both sides of the Lagoon and will enhance the Lagoon's water

[4] There are estimated to be approximately 1,000 Hawaiian Stilts in the State of Hawaii. It is believed that these birds are about evenly divided between the islands of Oahu and Maui, with small numbers on other islands. As indicated in the text, only a portion of the Stilts on the island of Oahu use the Lagoon as a feeding ground and roosting place. (EIS 8, 26)

quality by aiding the ocean to flush out the current pollution in the Lagoon. (EIS 16-18) Furthermore, the project will involve the creation of a 240-acre marine pond which will be maintained by the University of Hawaii as an aquaculture research station. (EIS 38) The project also involves the creation of replacement habitats, both in the Lagoon and in nearby Pearl Harbor, for the Hawaiian Stilt. (EIS 26)

B. The Environmental Impact Statement

1. *Preliminary Steps*

In order to construct the Reef Runway, which is to cost between $60,000,000 and $70,000,000, the state made application to the Federal Aviation Administration ("FAA") for a 50% matching grant under the Airport and Airways Development Act of 1970, 84 Stat. 219, 49 U.S.C. § 1701 *et seq.* ("AADA").

Pursuant to the requirements of AADA, a public hearing was held at the Puuhale School in Honolulu on March 22, 1971, to consider the economic, social and environmental effects of the Reef Runway. Oral testimony was given by a number of public organizations (including Petitioners Life of the Land and the Hawaii Audubon Society), the Kalihi-Palama Community Council, school officials, local residents and others. Conservation groups at the hearing indicated a concern for replacement of the wildlife habitat of the Hawaiian Stilt. As a result of these concerns, and as discussed above, funds have been included in the Reef Runway project for the relocation of the Hawaiian Stilt habitat. None of the participants, including those Petitioners attending, objected to the Reef Runway project. (EIS 8-10)

2. *Preparation of the EIS*

The EIS for the Reef Runway project was prepared jointly by the Pacific region of the FAA and the State of Hawaii, with the Ralph M. Parsons Company, the design consultant on the Reef Runway project, assisting in the drafting. (Tr. 298-99) More than ten drafts were prepared. (Tr. 360) Preparation was in accordance with the FAA guidelines on the preparation of impact statements. Herman Bliss, Chief of the Airports Division, Pacific Region, FAA, James Dittmar, a project engineer for Parsons, and a number of State officials worked closely on drafting the statement. There were numerous meetings among the FAA, the State officials and Parsons. (Tr. 298-99, 822) Bliss of the FAA was in on every stage of the drafting. (Tr. 821) In response to a question as to who actually wrote the impact statement, Dittmar testified that:

> "I would go through and put one page in and then after review with perhaps the State and the FAA, they would revise—that page would be revised extensively, so . . . there is no real pride of authorship or any authorship in that page anymore. *It is more or less a joint effort by Parsons, the State, and the FAA.*" (Tr. 299; emphasis supplied)

The draft impact statement was then circulated for comment.[5] In addition to the statement itself, there were available for consultation more than 2,000 pages of supporting documents and materials. In view of the bulk of these supporting references, copies were forwarded to Washington, D.C., as needed while the originals were maintained at the FAA regional office in Honolulu and made available to

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[5] A list of those from whom comments were expressly solicited appears at pages i-x of the final EIS and includes 35 agencies of the United States Government, as well as numerous State agencies and private organizations (including Petitioners Life of the Land and Hawaii Audubon Society).

anyone who wished to see them. In fact, Petitioner Life of the Land did review those references. (Tr. 835-36) The comments to the draft impact statement by the various Federal agencies were reviewed and considered by the Chief of the Environmental Staff, Planning Division, at the FAA's Washington office and copies of all comments by Federal agencies were submitted to the Assistant Secretary of Transportation for Environment and Urban Systems. (Tr. 747-49) Copies of the comments were also forwarded to the Council on Environmental Quality. (Tr. 747, 778-79)

In January, 1972, the final EIS, redrafted by the FAA and the State, with the aid of Parsons, in light of all the state, Federal, and private comments, was approved by the FAA Pacific Regional Director and forwarded to Washington. On February 29, 1972, the impact statement was approved by the Assistant Secretary's office and forwarded to the Council on Environmental Quality. On March 30, 1972, the Executive Director of Petitioner Life of the Land requested an opportunity to make further comments on the final EIS. The Assistant Secretary's office and the Council on Environmental Quality agreed to withhold further action on the Reef Runway until Petitioner's comments could be reviewed. (Tr. 750-52) On May 2, 1972, after reconsideration of the final EIS in light of Petitioner's comments, the Assistant Secretary's office and the Council on Environmental Quality concluded that the EIS was fully satisfactory and that no further changes needed to be made. (Tr. 752-56) Finally, on May 3, 1973, the Administrator of the FAA approved the funding of the Reef Runway project based upon the final EIS. (Tr. 756-57) Through the time of final Federal approval, the State of Hawaii had spent close to $1,000,000 in engineering and environmental studies. (Tr. 570)

3. *The Final EIS*

The final EIS is 46 single-spaced pages long, plus appendices. It includes the following:

(a) *An introduction*, detailing the history of the Reef Runway project and the present congestion at HIA. (EIS 1-2)

(b) *A description of the proposed Reef Runway* and associated protective structures, together with a statement of the purposes for building the runway and a description of the Keehi Lagoon, as previously discussed. (EIS 3-7)

(c) *A discussion of the public hearing of March 22, 1971*, the participants, and the comments. (EIS 8-10)

(d) *A consideration of the impact of the project on the human and natural environment*, as follows:

(i) *Noise Abatement.* The EIS discussed present levels of unacceptable noise pollution, described earlier, and concluded, based upon the standard FAA-approved methods of noise measurement, that the construction of the Reef Runway would significantly reduce the aircraft noise in all areas currently subject to overflights. (EIS 12-15)

(ii) *Land Use.* The EIS reviewed the present land use in the project area, pointing out that the Reef Runway would not dislocate any persons lawfully resident on private or public property, or interfere with any existing public park, recreation area, or wildlife or water fowl refuge of national, state or local significance. (EIS 15-16)

(iii) *Recreational Uses.* The EIS noted that due to the polluted nature of Keehi Lagoon, recreational uses thereof are presently limited and concluded that the flushing action resulting from the construction of the two new channels described above (pp. 9-10) would enhance the recreational uses of the Lagoon.

In addition, Keehi Lagoon Park at the north end of the Lagoon would experience a marked reduction of aircraft noise. (EIS 16-17)

(iv) *Water Quality.* As described above, the EIS concluded that the water quality of Keehi Lagoon would be significantly improved by the dredging of the two new channels. The EIS reached this conclusion based upon a number of published water quality studies, including one dealing specifically with the Keehi Lagoon, and a special testing model for this project developed by the University of Hawaii. (EIS 17-20)

(v) *Visual and Air Pollution.* The EIS pointed out that the Reef Runway would move the major portion of the high-pollution heavy jet aircraft traffic out to sea, thus reducing the air pollution as to the inhabited onshore areas and improving the visual appearance of the Lagoon.[6] (EIS 20)

(vi) *Wildlife.* The EIS noted that 186 acres of coral mudflats used by the Stilt, as well as by three types of migratory birds, would be lost due to the construction of the Reef Runway. However, the EIS indicated

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[6] Symptomatic of the fault-finding approach of Petitioners is their critique of the failure of the EIS to discuss the impact of the project on invisible air pollution and the failure to order "studies" of air quality effect. (Pet. 7 n. 3) To be sure, no "studies" of air quality effect were ordered since a threshold determination was made by both State and Federal authorities that moving aircraft takeoffs to the Reef Runway almost a mile and a half seaward and away from populated areas could not increase air pollution and in fact would alleviate the air pollution problem. (Tr. 574, 766-67) Indeed, there was testimony in the record from Bach, Petitioners' own expert, that "When you get further away from somewhere, pollution tends to decrease with distance" and that to determine whether standards are met, "one measures, of course, where people are living." (Tr. 175, 178) Bach further admitted that one of the methods of preventing air pollution is "If you just move it further out . . . you couldn't care less where it goes." (Tr. 202) It is hard to analyze Petitioners' contention that air quality studies should have been ordered and performed in order to confirm these obvious truths as anything more than obstructionism.

that a joint program of state and Federal agencies was under way to create three new bird habitats which would consist of a number of islands and ponds and would be of equal or greater value to the Stilt and other birdlife.[7] (EIS 26)

(vii) *Marine Life and Fish.* The EIS here referred to a number of studies and scientific collection experiments, all of which indicated that the marine and fish life in the Lagoon is presently poor due to the polluted waters. The EIS concluded that the improved circulation in the Lagoon which would result from the Reef Runway project would improve the ecological situation in the Lagoon, increasing the numbers of most forms of sea life from microorganisms to fish. (EIS 27-32)

(e) *A notation of the only probable adverse impact of the project;* namely, the use of 765 acres of the Lagoon for the runway. (EIS 33)

(f) *A discussion of alternatives* to the Reef Runway project, as follows:

(i) *"10-28" Runway.* This alternative, originally proposed in the 1962 study mentioned above, would have been built on HIA grounds without the necessity of utilizing part of the Lagoon. It was rejected because the prevailing wind patterns at HIA would have subjected this runway to an unsafe level of crosswinds. Furthermore, while such a runway would lessen the overflight problems for the metropolitan areas east of HIA, it would create new ones for the metropolitan areas west of the airport. (EIS 34)

(ii) *Close-in Parallel Runway.* This alternative, originally recommended by the 1967 HIA Development

[7] This program is now virtually complete. A 25-acre wildlife habitat at Honouliuli, not previously used by Stilts, is now being used by a number of these birds. The improved habitat in Pearl Harbor has also enjoyed increased usage by Stilts.

Plan, called for a runway similarly oriented to the Reef Runway, but onshore. Such a runway would have solved HIA's capacity problems but would not have moved the heavy jet traffic patterns significantly further away from the densely-populated portions of Honolulu and thus would not have significantly lowered the noise pollution or appreciably improved the safety situation. (EIS 34)

(iii) *Stanford Research Institute Proposal.* The SRI proposal, suggested by a number of airlines, advocated the extension of the existing principal 8L-26R runway 4,000 feet to the west and the construction of a smaller 6,500 foot runway to the south of 8L-26R. This alternative was rejected for a number of reasons. The Air Force objected that the westward extension of 8L-26R would significantly increase the noise pollution at Hickam Air Force Base and its adjoining residential areas. Furthermore, there would have been no appreciable lessening of overflights of the metropolitan areas west of the airport. (EIS 34-35)

(iv) *Nonconstruction.* Another alternative considered was simply to forego the project entirely. This alternative was rejected because the continuation of the high noise pollution-high safety problem situation posed by the present overflights of the Honolulu area was considered unacceptable and because it would result in a limitation on the use of HIA due to capacity problems. (EIS 35)

(g) *A description of the construction procedures* and of the irreversible and irretrievable commitments of resources to be used in the project. (EIS 36-39)

(h) *A discussion of actions taken* to assure maximum safeguards against adverse environmental impact from the project. These actions include the development of water circulation criteria, the provision of pollution control guidelines during construction and a review of the criteria for the new bird habitats. (EIS 40-43)

C. Proceedings Below

On November 8, 1972, one day prior to the scheduled opening of bids for the construction of the Reef Runway, Petitioners filed suit in the United States District Court for the District of Hawaii and sought to enjoin the construction of the runway on the ground that the EIS was insufficient in a number of respects. A temporary restraining order was issued but was dissolved by the District Court on December 22, 1972, after a thorough examination of the EIS at the seven-day hearing on Petitioners' application for a preliminary injunction. That hearing resulted in a District Court finding that the EIS complied with all statutory requirements. (App. 33-42)[5] The District Court's final decision, dated April 12, 1973, adopted its earlier decision on the preliminary injunction as its decision on the merits. (App. 43-44) The Court of Appeals unanimously affirmed. (App. 1-30)

Petitioners made a multiplicity of contentions at the trial and on appeal, ranging from the claim (now abandoned) that the EIS was invalid because the 2,000 pages of reference material mentioned in the draft EIS had not physically accompanied the draft EIS at all times, to the claim that the EIS was invalid because of the participation of Parsons, the project design consultant, in its drafting. Petitioners' major contention, however, was that although the EIS did discuss the alternative of foregoing the project entirely, in that discussion it failed to treat of a number of so-called "nonconstruction alternatives"—"alternatives" raised for the first time by Petitioners in court.

Specifically, Petitioners contended that the EIS should have mentioned the "alternatives" set out below. The Dis-

[5] We so designate the Appendix to the Petition for Certiorari.

trict Court and Court of Appeals considered these claims and rejected each one as a factual matter, based upon the evidence in the record:

(a) *Moving the Air Force KC-135 tankers to another field.* The evidence showed that the FAA had initially considered this possibility but that the Air Force had been consulted and had refused to move its tanker operations from HIA. (Ds. Ex. 35; App. 22) Furthermore, this alternative would do nothing to alleviate the noise and safety problems stemming from overflights of commercial aircraft. (App. 23)[9]

(b) *Transferring private aircraft to another airfield.* The evidence showed that a ban on "general" (*i.e.*, private) aviation at HIA would violate prior HIA legal agreements guaranteeing access to the airport to all users. In addition, such a ban would have no effect on the major overflight problems caused by commercial and military aviation. (App. 23) Finally, there was simply nowhere else on the island (of Oahu) to relocate general aviation, although in the future other sites might become available. (Tr. 550-51, 554-56)

(c) *Changing the takeoff patterns of inter-island flights.* The evidence indicated that requiring the two-engined aircraft used for inter-island flights, which require a shorter runway than do the larger trans-Pacific aircraft, to take off from a different position (the end, rather than the

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[9] Petitioners contend, apparently in passing (Pet. 24 n. 9), that "The United States Air Force, whose KC-135 tankers are conceded by all parties to be the worst noise and safety offenders at HIA, has consistently refused to commit itself to utilizing the new Reef Runway." In fact, the record contains (Tr. 624-28) a commitment, signed by the Assistant Secretary of the Air Force, to use the Reef Runway at HIA (which has been designed to Air Force design standards) except during emergencies.

cross) on the existing runway would affect only a small percentage of airport operations and, of course, would have no effect upon the larger and noisier military and trans-Pacific commercial aircraft. (App. 23) Furthermore, under the present crowded conditions at HIA (without the Reef Runway) the additional time required for inter-island takeoffs under this "alternative" would cause serious additional airport congestion.[10] (Tr. 565)

(d) *Imposition of higher landing fees.* The evidence demonstrated that higher landing fees were not a reasonable alternative because fees four to five times higher at other airports have made no significant difference in air traffic patterns. (Tr. 557-58; App. 23)

(e) *Other "alternatives."* There was no evidence at all in the record to suggest that any of the other "alternatives" alleged for the first time in court, such as forcing the airlines to change their schedules, imposing curfews, retrofitting older aircraft with less noisy power-plants, or converting to wide-body aircraft, are reasonable possibilities at HIA. (App. 23-24) Furthermore, most of these "alternatives" are not within the scope of the powers of HIA or the State of Hawaii. Thus, this Court held in *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624 (1973), that local authorities cannot impose curfews. Similarly, support for retrofitting older aircraft—which can hardly be done by HIA alone—was denied by the United States Office of Management and Budget. (Tr. 562-63) Finally, none of these "alternatives" would have alleviated

[10] However, once the Reef Runway is in operation, there is a likelihood that the inter-island carriers would be required, if they did not use the Reef Runway, to start at the end of the existing runway, since the reduction of traffic on the existing runway occasioned by the construction of the Reef Runway would make this feasible. (Tr. 640)

the safety problems from overflights of populated areas due to the location of the present principal runway.

For all of the above reasons, both courts below rejected *in toto* Petitioners' contentions as to the insufficiency of the EIS treatment of alternatives, holding that the EIS need set forth only those alternatives "sufficient to permit a reasoned choice." (App. 24) They rejected the contention that every conceivable alternative must be set forth in the EIS even where the implementation, feasibility or efficacy of the alternative is "remote and speculative." (App. 24) Then, after a full review of the EIS in light of the requirements of § 102(2)(C) of the National Environmental Policy Act and § 16(c)(4) of the Airport and Airways Development Act, the lower courts upheld the adequacy of the EIS. After the Court of Appeals' decision, it denied a petition for rehearing and a suggestion for rehearing *en banc*.

After construction of the Reef Runway commenced following the decision of the Court of Appeals, Petitioners submitted to the Circuit Justice an application for stay of the mandate of the Court of Appeals and for reinstatement of an injunction pending appeal of that court pending application for certiorari. On November 2, 1973, Mr. Justice Douglas granted that application, pending reconsideration of the application when memoranda from the Respondents were received. Upon such reconsideration, Mr. Justice Douglas, on November 7, 1973, adhered to his original order. Thereafter, various of the Respondents, including the Director, Department of Transportation, State of Hawaii, moved the full Court to vacate the order. The Director's motion appended an affidavit of an oceanographer in support of the contention that "more harm than good results to the environment by the injunction", for the reason, among others, that the stage of construction which had been reached at the time of the order created increased

stress on the marine environment in the Lagoon. An affidavit of the Chief of the State Airports Division stressed the economic consequences in terms of layoff of workers, costs incurred without benefit and the extent of idle workers and equipment occasioned by the stoppage. On November 21, 1973, this Court entered an order vacating the stay order. Construction has progressed since then on the Reef Runway and protective structure.

ARGUMENT

This case involves the attempt of Petitioners Life of the Land, *et al.*, to halt the construction of the Reef Runway at Honolulu International Airport, Honolulu, Hawaii, on the grounds that the EIS for the project is legally insufficient. Abandoning most of the thirteen or so separate contentions asserted in the Court of Appeals as to alleged deficiencies in the EIS and in the project, Petitioners make three claims here as to errors on the part of the courts below. They claim conflicts among the Courts of Appeals on all three issues. In fact, Petitioners' real quarrel is with the interpretation of the evidence concurred in by both courts below. There is no conflict with the decisions of other Courts of Appeals, and no issue warranting further review. Accordingly, certiorari should be denied.

I. The Court of Appeals Applied Correct Standards of Review

Petitioners contend that the Court of Appeals erroneously applied the Administrative Procedure Act's ("APA") "arbitrary and capricious" standard in its review of the question of what alternatives were required to be included in the EIS and that, as a result, there is a conflict among the Courts of Appeals as to the scope of review. This contention is simply based upon a misreading of the opinion below. The court below in fact quite properly applied two different standards of review to two different matters:

(a) *Review of the substantive decision.*—With respect to the FAA's substantive decision to proceed with the Reef Runway project, the court applied the "arbitrary and capricious" standard of the APA, 5 U.S.C. § 706(2)(A). The court quoted from its decision in *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275 (9th Cir. 1973):

> "Reversal of a substantive decision is appropriate only to situations where the . . . [decision] was arbitrary or clearly gave insufficient weight to environmental factors." 475 F.2d, at 1281; App. 18.

The court then observed that it would "examine appellants' substantive challenges, therefore, mindful of the circumscribed nature of our review." (App. 18)[1]

This limited examination of the substantive decision is in accord with the law in every circuit; indeed, this Court

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[1] The positive environmental effect of the Reef Runway—as made evident by the discussion at pp. 3-10, 13-15, *supra*—is such that the substantive decision would have survived any conceivable standard of review. Petitioners' scanty Statement of the Case (Pet. 4-10) ignores the environmental problems which the Reef Runway helps solve and essentially contents itself with a critique of the EIS and a discussion of the steps in the present litigation.

has indicated that the "arbitrary and capricious" standard must be applied in such instances:

> "[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

See also *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F.2d 346, 353 (8th Cir. 1972); *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

Petitioners' complaint that this result makes the NEPA "an act of futility," because even before NEPA an agency's substantive decisions were subject to this standard of review, misses the point. The NEPA was not designed to create a new standard of review as to an agency's substantive decisions—rather, it created new procedural requirements, and also created a right to review as to compliance with those procedures, as discussed below. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*, 401 U.S., at 419-20; *Save Our Ten Acres* v. *Kreger*, 472 F.2d 463 (5th Cir. 1973).

(b) *Review of procedural decisions.*—With respect to the review of the FAA's procedural decisions within the scope of the NEPA[2]—for example as to which alternatives would be discussed in the EIS—the court below applied an entirely different standard, that of "reasonableness." (App. 24) Obviously, it would be impossible for any

[2] The NEPA requires that the EIS include a statement on "alternatives to the proposed action." 83 Stat. 853, 42 U.S.C. § 4332 (2)(C)(iii). There is no question but that the EIS here discussed "alternatives to the proposed action." The only issue is how many and which "alternatives" had to be discussed. It is as to this narrow sort of procedural issue within the scope of the NEPA that the court below applied a standard of "reasonableness."

EIS to consider and expressly reject every alleged "alternative" which litigation counsel, in a subsequent court attack on the EIS, might imagine. Accordingly, the court below, citing *Natural Resources Defense Council, Inc.* v. *Morton, supra*, and other authorities, held that "the EIS need only set forth those alternatives 'sufficient to permit a reasoned choice'." The Court of Appeals specifically stated that the requirement of "NEPA's 'alternatives' discussion is subject to a construction of reasonableness." (App. 24) The "reasonableness" standard is followed in all the circuits insofar as we are aware. See, in addition to the cases cited above, *Wyoming Council* v. *Butz*, 5 E.R.C. 1844 (10th Cir. 1973); *Hanly* v. *Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

As a result of NEPA, therefore, an agency's procedural determinations are subject to a more thoroughgoing review than are its ultimate substantive decisions. This result is entirely consistent with Congress' view of NEPA as "action forcing" in the sense that it requires the agency to put on the table, and weigh and consider, environmental costs; NEPA does not require particular substantive results. See *Silva* v. *Lynn*, 482 F.2d 1282 (1st Cir. 1973); *Calvert Cliffs Coordinating Committee* v. *Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

Under this "reasonableness" standard, the court below examined the record in detail, reviewed the evidence, and concluded that, based upon the evidence before it, Petitioners' contended-for "alternatives" were unreasonable and the procedural decisions of the FAA with respect to the alternatives to be included and discussed in the EIS were reasonable. See, *e.g.*, App. 21-24.[3]

[3] We note that a number of the cases cited by Petitioners in support of their contention that a conflict exists between the Courts

II. The Decision of the Court Below Was Correct as to the Discussion of and Findings as to Alternatives Under the NEPA and AADA

1. *NEPA.*—As the earlier discussion (pp. 15-16, *supra*) makes plain, the EIS here contained a discussion of the serious alternatives to the Reef Runway and was prepared after extensive opportunity for comment and the fullest publicity as to the proposed project. (Pp. 10-12, *supra*) Petitioners' principal contention in this litigation now is that the EIS should have contained a discussion of still more "alternatives"—"alternatives" which Petitioners, who participated in the administrative process, never voiced there. But, as pointed out in the preceding section, the Court of Appeals reviewed the evidence in the record and determined that the decision not to include in the EIS a discussion of certain of Petitioners' now-proposed "nonconstruction alternatives" was reasonable. Petitioners now contend that in this respect the decision conflicts with *Natural Resources Defense Council, Inc.* v. *Morton, supra* ("*NRDC*"). (Pet. 20-21) In fact, as the opinion below makes clear, there is no such conflict. The court below expressly relied upon the *NRDC* case in reaching its conclusion. (App. 24)

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of Appeals involve cases in which the decision of the agency was to prepare *no* EIS at all. *E.g., Save Our Ten Acres* v. *Kreger, supra; Hanly* v. *Kleindienst, supra.* While we believe, as demonstrated above, that there is no conflict between these cases and the present case, we would also note that that line of cases specifically states that there is a significant distinction between instances where no EIS is prepared at all and those where the dispute involves how many, and which, "alternatives" need be discussed in the EIS. See *Save Our Ten Acres* v. *Kreger, supra*, 472 F.2d. at 465 n.4. Obviously, no EIS can discuss every conceivable alternative.

NRDC held that an agency may not disregard alternatives merely because their implementation is within the jurisdiction of another agency. 458 F.2d, at 834. Petitioners see a conflict between that holding and the holding below that there need be no EIS discussion of the removal of the Air Force tanker operation from HIA to another location in the present case. (Pet. 20-21) But, as the court below pointed out, the Air Force—the other agency involved here—*had been approached* and had flatly *refused* to go along with this "alternative." (App. 22-23) Thus, there is no question here of failure to consult other agencies or to consider an "alternative". Rather, as a result of that consultation it was clear that implementation of this "alternative" was impossible. That sort of "alternative" need not be discussed. *NRDC* v. *Morton, supra,* 458 F.2d, at 834, 836.

Petitioners next note that *NRDC* held that "discussion of particular alternatives may not be omitted merely because they are not complete solutions in and of themselves" and claim that the court below discounted the possibility of moving the Air Force and "general" aviation operations somewhere else for just such a reason. (Pet. 20-21) In fact, as just recounted, the court below held that moving the Air Force operations need not be discussed because it was not possible. (App. 22-23) Similarly, the court noted that a ban on general aviation would be impossible because of HIA's legal commitments.[4] Furthermore, the court pointed out that moving the general aviation operation would have "no effect" at all on the problems of noise pol-

[4] As set forth above, moving the inter-island DC-9 and Boeing 737 two-engine takeoffs so that they would commence at a different point on the existing runway was also not feasible as a nonconstruction alternative because, absent expansion of the airport through new runway construction, moving the takeoff point for these flights would cause intolerable congestion. See pp. 18-19, *supra.*

lution and safety, which are caused by the commercial and military operation. (App. 23) *NRDC* does not require a discussion of such "alternatives."

2. *AADA*.—Petitioners contend that the holding of the court below of compliance with § 16(c)(4) of the AADA, 84 Stat. 227, 49 U.S.C. § 1716(c)(4), conflicts with this Court's interpretation of certain similar language (in another context) in § 4(f) of the Department of Transportation Act, as amended, 82 Stat. 824, 49 U.S.C. § 1653(f). The claim is that *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*, in effect holds that compliance with AADA requires a showing of "the most unusual situation" before the project can proceed. (Pet. 21-27) Petitioners quote at length from *Overton Park*, relying on this Court's statement that the DOT Act's

> ". . . language is a plain and explicit bar to the use of federal funds for the construction of highways through parks—only the most unusual situations are exempted." 401 U. S., at 411; Pet. 23.

Petitioners' argument is a classic example of attempted literal transference of words from one context to another without concern for statutory purpose or common sense.[5] Congress in the DOT Act unmistakably meant a bar, absent "the most unusual situation," on the construction of highways through parks. The purpose of that Act was certainly not to encourage the construction of highways through parks. But it is hardly likely that Congress in

[5] In the context of the AADA, the language is to the effect that the Secretary "shall authorize no such [airport extension] project found to have adverse effect [on natural resources . . . and other factors affecting the environment] unless the Secretary shall render a finding . . . that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect." § 16(c)(4).

enacting legislation—the AADA—for "the establishment of a nationwide system of public airports to meet the present and future needs of civil aeronautics," § 14(a), 84 Stat. 224, 49 U.S.C. § 1714(a), intended "a plain and explicit bar to the use of federal funds" for the construction of airports and runways. Indeed, the entire purpose of the AADA was to provide the mechanism for Federal financing of airport and runway improvements.[6]

As the court below concluded, based upon its detailed examination of the record and upon this Court's holding in *Overton Park*, the responsible Federal agency reasonably believed—for the reasons discussed at length in the Statement—that there were no feasible alternatives to the Reef Runway project and that steps had been taken to "minimize" whatever adverse effects it had on the environment.[7]

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[6] Petitioners' argument that the language in AADA § 16(c)(4) must be interpreted to mean the same as the language in § 4(f) of the DOT Act produces extraordinary consequences. While the occasion for adding § 4(f) to the DOT Act was the passage of the Federal-Aid Highway Act of 1968, see Pub. L. 90-495, § 18(b), 82 Stat. 824 (1968), § 4(f) is not limited to highway projects. It requires the making of the finding in question for "any program or project which requires the use of any publicly-owned land from a public park" if the "program or project" is one within the jurisdiction of the Secretary of Transportation. Thus, § 4(f) requires the finding in question to be made in the case of the Federally-financed construction or extension of an airport through or in a public park (such as in the well-publicized airport extension program in Grand Teton National Park, Wyoming). Petitioners' argument thus leads to the absurdity that no higher standard is required under DOT Act § 4(f) to construct an airport extension in a public park than is required under the AADA to construct an airport extension elsewhere.

[7] As the Court of Appeals pointed out, the factor which triggers the necessity for the finding under the AADA is the existence of an "adverse effect" upon the environment through the project. (App. 29) But it is plain that virtually every airport expansion project will have some adverse effect upon certain aspects of the environment. In this context, the language in the AADA is obviously intended to move the Federal agency toward carrying

(App. 30) The appropriate procedures were followed when that finding was made[8] (App. 29-30), and the AADA requires no more. *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U. S., at 416.

III. Parsons' Participation in Drafting the EIS Was Not Improper

As indicated (pp. 9-12, *supra*) the EIS in the present case was jointly prepared by the FAA, the State of Hawaii, and the Ralph M. Parsons Company, the Reef Runway project's design consultant. Both courts below concluded that the fact that Parsons, which was undisputedly financially interested in the project, participated in the drafting did not invalidate the EIS because the responsible FAA officials participated at every step. (App. 13-15; 40-41) Petitioners claim that this holding conflicts with the Court of Appeals' decision in *Greene County Planning Board* v. *Federal Power Comm'n,* 455 F.2d 412 (2d Cir.), *cert.*

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out the expansion in a way which minimizes the adverse effect upon the environment. Here, the only such adverse effect was the effect on Keehi Lagoon (EIS 33) and, in particular, upon the Hawaiian Stilt. The project, however, involved construction of suitable alternative grounds for the Stilt, and it was on this basis that the agency found that "all possible steps have been taken to minimize such adverse effect." AADA, § 16(c)(4). There is no attack in this Court on the adequacy of the measures to provide alternative grounds for the Hawaiian Stilt.

[8] There is no dispute that, pursuant to DOT Order 5050.2, the finding required by the AADA is to be made by the director of the FAA's Pacific region, or that such a finding was in fact made. A copy of that finding appears in the final EIS immediately preceding the title page. Furthermore, there is no dispute that the EIS itself may serve either as the § 16(c)(4) finding, or, in the alternative, as the record in support of that finding. *Citizens' Airport Committee* v. *Volpe,* 351 F. Supp. 52 (E.D. Va. 1972); App. 29.

denied, 409 U.S. 849 (1972), and with a District Court decision, *Conservation Soc'y* v. *Secretary of Transportation*, 362 F. Supp. 627 (D. Vt. 1973).

In *Greene County*, the FPC had required the applicant for a permit to write the impact statement, which the FPC then adopted verbatim with no input of its own. See 455 F.2d, at 416-17. Similarly, in *Conservation Soc'y*, the Federal Highway Administration delegated responsibility for the preparation of the EIS to the Vermont Highway Department. The FHWA's representative occasionally consulted with, but never supervised, the Vermont personnel who did the actual drafting. Furthermore, the FHWA had no significant input on the final EIS, contenting itself with three general comments. 362 F. Supp., at 629-30. The FHWA did not write or edit a single passage of the EIS. *Id.*, at 632. In both these instances, the courts held that the EIS involved was improperly prepared.[9]

These cases are inapposite here. Both courts below concluded that "the evidence shows that F.A.A. officials did in fact work together with state officials and a private contractor and gave it [the EIS] close attention." (App. 14; 40-41) There is thus no question here of a Federal agency "entrusting" the drafting of an EIS to outsiders, as Petitioners claim. No court has held that it is forbidden for the Federal agency in charge to work with others, so long as that agency performs its statutory duty of controlling

[9] To be sure, there have been a number of cases which appear to look the other way from *Greene County* and *Conservation Soc'y*, and uphold such delegations of the responsibility for the drafting of an EIS. See *National Forest Preservation Group* v. *Volpe*, 352 F. Supp. 123 (D. Mont. 1972); *Finish Allatoona's Interstate Right, Inc.* v. *Volpe*, 355 F. Supp. 933 (N.D. Ga. 1973). Whatever the difference in approach in the cases, the decision below is not at variance with the decisions relied upon by Petitioners.

the drafting of the EIS. That is precisely what the courts below found, as a matter of fact, was done here.[10]

• • • •

The EIS in this case and the concurrent rulings of the two lower courts make it plain that the Reef Runway project will have a positive, beneficial effect on noise and air pollution over the densely populated city of Honolulu and that the construction projects incident to it will actually improve the present water pollution situation in Keehi Lagoon. The only material environmental problem identified in the review process was the problem as to the Hawaiian Stilt, and Petitioners raise no question here as to the adequacy of the measures developed to produce equivalent grounds for the Stilt. There is no conflict among the Courts of Appeals as to the various questions of procedure tendered to this Court in the present litigation, and there is no reason for further review of the concurrent findings of the two courts below.

[10] Petitioners complain (Pet. 10, 28) that they were restricted in their examination of the Parsons' representative to show the extent to which he had participated in drafting the EIS. But this is irrelevant. It was not disputed that Parsons participated materially in drafting the EIS. The only question is whether the Federal agency also participated materially and performed its statutory duty of controlling the drafting of the EIS.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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No. 73-1088

In the Supreme Court of the United States

OCTOBER TERM, 1973

LIFE OF THE LAND, ET AL., PETITIONERS

v.

CLAUDE S. BRINEGAR, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1088

LIFE OF THE LAND, ET AL., PETITIONERS

v.

CLAUDE S. BRINEGAR, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1-30) is reported at 485 F. 2d 460. The order of the court of appeals denying the petition for rehearing *en banc* is set forth at Pet. App. B, 31-32. The decision and order of the district court (Pet. App. C, 33-42) on the motion for a preliminary injunction are reported at 363 F. Supp. 1171. The final decision and order of the district court are set forth at Pet. App. D, 43-44.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1973. A timely petition for rehearing *en banc* was unanimously denied by that court on October 16, 1973. The petition for a writ of certiorari was filed on January 10, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly determined that the environmental impact statement in this case was adequate.

2. Whether utilization of the resources of the State and an independent consulting firm in preparation of an environmental impact statement, with full participation by and under the control of the responsible federal officials, is permissible under the National Environmental Policy Act.

STATUTES INVOLVED

The relevant statutes involved are set forth in an appendix to the petition for certiorari (Pet. App. E, 45–48).

STATEMENT

Petitioners brought this action for injunctive relief to block construction of the Reef Runway project at the Honolulu, Hawaii, International Airport on the grounds that the federal defendants had failed to comply with certain requirements of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, and the Airport and Airway De-

velopment Act of 1970 (AADA), 84 Stat. 219, 49 U.S.C. 1701 *et seq.* Specifically, petitioners claimed that the respondents had violated Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), because the Environmental Impact Statement (EIS) prepared for the project did not adequately discuss certain alternatives to the proposed action; that the respondents had not complied with Section 16(c)(4) of AADA, 49 U.S.C. 1716(c)(4), in making the finding that no feasible and prudent alternative exists and that all feasible steps had been taken to minimize adverse effects; and that the respondents had impermissibly delegated the preparation of the EIS to a private consulting firm which had a financial interest in the project.

Honolulu International Airport (HIA), site of the Reef Runway project, has a unique role as an airport serving a number of essential interests. Because more than 99 percent of all passengers to and from the State travel by air, it is Hawaii's principal gateway (Pet. App. A, 5). It is also the Nation's third largest point of entry for international arrivals (*ibid.*), with scheduled overseas service by 20 air carriers. For Hawaiians, air cargo operations are vital during periods of labor disputes involving marine transport. The airport has also been essential for United States Air Force operations since the adjacent Hickam Air Field was closed.[1]

[1] In fiscal year 1971, the Air Force accounted for 52,221 operations (a landing or a take-off) of the more than 250,000 operations at HIA (Pet. App. A, 5).

With the advent of jet aircraft operations at HIA in the early 1960's, a growing public concern developed over the problems of jet noise pollution and potential aircraft disasters. Because of the close proximity of the airport, and the attendant flight paths, to several densely populated residential areas and the downtown Honolulu business district, planning efforts were centered on developing a solution that would move the aircraft flight paths seaward, away from human habitation. After eight years of examining a number of proposed solutions, a state task force recommended, in February 1970, that the Reef Runway be constructed at the airport (Pet. App. A, 6–9).

The Reef Runway project involves the construction of a new 12,000-foot runway that would be located parallel to and 6,700 feet south of the existing main runway. It would be constructed on filled reefland in the Keehi Lagoon in Mamala Bay. Those areas are now scarred from three 10,000-foot seaplane runways cut by the Navy during World War II, and are also polluted by the daily discharge of 55 million gallons of raw sewage from the City and County. The reef runway would largely eliminate the possibility of a disastrous aircraft accident in the densely populated residential areas adjacent to the existing main runway [2] and would also reduce noise pollution by moving it more than a mile away.

[2] Public concern over a jet aircraft mishap may be somewhat sharpened by the fact that the Air Force frequently uses HIA for operations of its KC–135 aircraft, a jet tanker capable of holding 160,000 pounds of jet fuel.

In connection with the proposed project, the State of Hawaii expended almost one million dollars on various engineering and environmental studies. These studies examined the effect of the runway on birds, fish, marine life, and water quality. Because it appeared that the project would have an adverse impact on a portion of the roosting area used by the endangered Hawaiian Stilt, work is now underway to relocate these birds to one new and one improved habitat at a cost in excess of $350,000 (Pet. App. A, 27–28).

In order to fund the Reef Runway project, the State applied to the Federal Aviation Administration for a matching grant under the Airport and Airway Development Act of 1970, 49 U.S.C. 1701 *et seq.* Accordingly, the FAA, in December 1970, began to prepare an Environmental Impact Statement on the proposed project. For assistance in the preparation of the EIS, the Ralph M. Parsons Company, a private consulting firm, was engaged. Several state employees also assisted the federal officials in the preparation of the document. The final EIS was approved by the regional director of the FAA as required by Section 16(c) of AADA. On January 21, 1972, the EIS was sent to agency headquarters and, after further review, to the Department of Transportation's Assistant Secretary for Environment and Urban Systems, where it was approved for filing with the Council on Environmental Quality on February 29, 1972.

Both the court of appeals and the district court rejected petitioners' numerous attacks upon the adequacy of the EIS. Both courts found no illegality in

the assistance rendered by the private consulting firm to the FAA in the preparation of the EIS. Furthermore, both the district court and the court of appeals held that the finding by the Secretary of Transportation pursuant to Section 16(c)(4) of AADA, that no feasible and prudent alternative exists, is supported by the record.

ARGUMENT

1. The determination by the court of appeals that the Environmental Impact Statement adequately sets forth alternatives to the proposed action is primarily a factual matter grounded in the record before the district court. Further review of that essentially factual issue by this Court is not warranted.

In response to petitioners' claims that the FAA had impermissibly ignored several viable alternatives to construction of the Reef Runway in its preparation of the EIS, the district court heard testimony by "the administrative officials who participated in the decision * * * explaining their action." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 420. After an extensive hearing on these alleged deficiencies of the EIS, the district court found that there was no basis for requiring discussion in the EIS of the matters urged upon the agency by petitioners. The court of appeals agreed and filed a comprehensive opinion carefully evaluating each of petitioners' claims. Contrary to their assertion that they had "demonstrated at trial that a variety of such reasonable 'non-construction' alternatives exist" (Pet. 8), the court of appeals found no support in the record to indicate that any of the alternatives proposed by petitioners

were either reasonable or feasible.[3] The refusal by the court of appeals to find that these alleged omissions had compromised the adequacy of the environmental analysis is a proper interpretation of the requirements of NEPA.

> There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities * * *.

Natural Resources Defense Council, Inc. v. *Morton*, 458 F. 2d 827, 837–838 (C.A. D.C.).

2. There is no real conflict among the circuits as to the applicable standards for review of the contents of a NEPA statement. In quest of a conflict, petitioners have lumped together cases challenging agency decisions not to prepare any impact statement at all,[4] with

[3] Specifically, the court rejected petitioners' suggestion that the Air Force shift operations or its heavy jet tanker to another island because the Air Force had already refused to do so (Pet. App. A. 22). Higher landing fees were rejected because that scheme had proven unsuccessful elsewhere (Pet. App. A. 23). Also, the court rejected such proposed alternatives as altering airline schedules, imposition of curfew restriction and conversion to wide-bodied aircraft because there was nothing in the record to indicate that such proposals could alleviate the problems which the Reef Runway was designed to cure.

[4] See, *e.g.*, *Hanly* v. *Kleindienst*, 471 F. 2d 823 (C.A. 2), certiorari denied, 412 U.S. 908; *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463 (C.A. 5); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F. 2d 1244 (C.A. 10); *Scientists' Institute Information, Inc.* v. *Atomic Energy Commission*, 481 F. 2d 1079 (C.A. D.C.).

cases attacking the adequacy of an EIS,[5] and cases questioning the final agency action based on its consideration of the EIS.[6] Not surprisingly, the courts have concluded that different standards of review should be applied to these quite different situations. On the other hand, in cases of the type presented here, involving the adequacy of an impact statement, the decisions have been basically consistent.

The courts of appeals have consistently held that judicial review of the "substantive" agency decision, if available at all, is governed by the "arbitrary" and "capricious" standard of 5 U.S.C. 706(2)(A). *E.g., Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F. 2d 1275, 1281 (C.A. 9); *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F. 2d 1109, 1115 (C.A.D.C.); *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 465–466 (C.A. 5).

By contrast, the adequacy of the contents of impact statements has been more closely reviewed by the courts, under a standard of "reasonableness." *E.g., Natural Resources Defense Council, Inc.* v. *Morton*, 458 F. 2d 827, 834 (C.A.D.C.); *National Helium Corporation* v.

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[5] See, *e.g.*, *Sierra Club* v. *Froehlke*, 486 F. 2d 946 (C.A. 7); *Iowa Citizens* v. *Volpe*, 487 F. 2d 849 (C.A. 8); *Environmental Defense Fund* v. *Armstrong*, 487 F. 2d 814 (C.A. 9), petition for a writ of certiorari pending, No. 73–1179; *National Helium Corporation* v. *Morton*, 486 F. 2d 995 (C.A. 10), petition for a writ of certiorari pending, No. 73–1120.

[6] See, *e.g.*, *Conservation Council* v. *Froehlke*, 473 F. 2d 664 (C.A. 4); *Environmental Defense Fund* v. *Corps of Engineers*, 470 F. 2d 289 (C.A. 8), certiorari denied, ~~407~~ 412 U.S. ~~1072~~ 931; *Sierra Club* v. *Froehlke*, 486 F. 2d 946 (C.A. 7).

Morton, 486 F. 2d 995 (C.A. 10), pending on petition for a writ of certiorari, No. 73–1120.

In the present case the court of appeals was concerned with only the issue of whether the content of the impact statement was adequate. While there is concededly some language in the opinion to suggest otherwise, it appears that the court of appeals applied the reasonableness standard used in all other circuits. Thus the court said that the impact statement's discussion of alternatives to the proposed action "is subject to a construction of reasonableness" and that it "need only set forth those alternatives 'sufficient to permit a reasoned choice'" (Pet. App. A, 24).[7]

But whatever the articulated standard (see note 7, *supra*), the courts—including the panel below—have reviewed impact statements in essentially the same way. The claims of alleged non-compliance with

[7] The court's opinion does, however, to some extent confuse the standard to be applied to the substantive agency decision with the standard to be applied to reviewing the contents of a NEPA statement. It, for example, speaks generally of applying the arbitrary and capricious standard to the "Substantive Content of the EIS" (Pet. App. A, 17). However, in considering specific objections to its contents, the court applied a standard of reasonableness. The court's semantic confusion here has subsequently been clarified. In *Lathan* v. *Volpe*, Nos. 72–2932 and 72–2974, decided December 7, 1973, a different panel of the Ninth Circuit pointed out the mistaken formulation in the opinion here, but observed that it could not have affected the decision (slip op. p. 4):

"* * * In *Life of the Land* v. *Brinegar*, 9 Cir., 1973 * * * we quoted *Jicarilla Apache Tribe*, *supra*, regarding substantive decisions, but then apparently applied § 706(2)(A) to the question whether the EIS satisfied the requirements of NEPA. This appears to be a misreading of *Jicarilla Apache Tribe*, but our reading of *Life of the Land* convinces us that the result would

NEPA have been measured against the agency's record (the EIS) and whatever evidence may have been adduced at trial. Here, the petitioners were given an opportunity in an extensive hearing before the district court to show why the claimed exclusion of certain material from the EIS rendered that document defective, and they were unable to show any error.[8]

3. In attempting to find a conflict between the decision below and that of the Second Circuit in *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412, certiorari denied, 409 U.S. 849, petitioners ignore the limited role assigned here by the responsible federal officials to the employees of the State and the Parsons Company in the task of writing the EIS. As noted by the court of appeals (Pet. App. A, 13–14), there was neither a delegation of authority nor abdication of responsibility in the preparation of

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be no different if we had thought that § 706(2)(D) applied." We submit that to the extent that there is a "conflict" in the formulation of applicable standards, it is a conflict *within* the Ninth Circuit, and one that that Circuit is in the process of resolving. No intervention by this Court is needed on that ground alone. Moreover, as we argue in the text, *supra*, however the standards are articulated, the extent of review and the result reached here were wholly proper.

[8] Petitioners' claim that requiring them to bear the burden of proof violated "the spirit of" NEPA is not properly based on the district court decision petitioners quote (Pet. 17–18) or on any other authority. In the sentence following the one quoted by petitioners, the court made clear that it was speaking only of the burden on an agency "once a prima facie showing has been made that the Federal agency has failed to adhere to the requirements of NEPA * * *." *Sierra Club* v. *Froehlke*, 359 F. Supp. 1289, 1335 (S.D. Tex.), appeal pending, C.A. 5, No. 73-2745.

the document. Rather, employees of the State and of Parsons participated with the FAA in writing the EIS. Beyond this cooperative team effort, the FAA remained in control of the process and the product, requiring revisions to it in the region and also in Washington (Tr. 298, 752–757). Thus, participation by non-federal employees did not taint the ultimate work product.[9] This is not the situation condemned by the Second Circuit in *Greene County, supra,* where that court found (455 F. 2d at 420):

> The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of [the applicant] for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and once again to act as an umpire.

Moreover, while compliance with Section 102 of NEPA requires good faith objectivity, it does not require subjective impartiality. *Environmental Defense Fund* v. *Corps of Engineers,* 470 F. 2d 289, 296 (C.A. 8). The record in this case shows that such objectivity was maintained by the FAA throughout the preparation of the EIS.

4. Pursuant to Section 16(c)(4) of the Airport and Airway Development Act of 1970, the Secretary

[9] At trial, the respondents acknowledged that the Parsons Company did have an agreement "to render management consultant services for the engineering, design and construction of the Reef Runway project" (Pet. App. A. 13). However, the FAA requested Parsons to assist it because of the expertise gained by the company in preparing a master plan for the airport in 1968.

found that there is no feasible and prudent alternative to the requested action which has not been considered, and that all possible steps had been taken to minimize any resulting adverse effects. The public record offered in support of that finding is the EIS. Petitioners' attack upon that finding, and their claim that the opinion below stands in conflict with this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, is subject to the same infirmities which pervade their other arguments. Alternatives to the proposed action which are unrealistic or unreasonable in the context of a NEPA analysis are no more feasible or worthy of consideration when making the Section 16(c)(4) finding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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